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In the

United States Court of Appeals

For the Seventh Circuit

No. 11924

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,

vs.

RAILROAD RETIREMENT BOARD,
Respondent.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenors.

Petition for Review of Order of the Railroad Retirement Board

APPENDIX TO RESPONDENT'S BRIEF.

MYLES F. GIBBONS,
General Counsel.

DAVID B. SCHREIBER,
Associate General Counsel, Railroad Retirement Board,
Attorneys for Respondent.

EDWARD E. REILLY,
DAVID M. GOLDMAN,
Railroad Retirement Board,
844 Rush Street,
Chicago 11, Illinois.
Of Counsel.

C. A. 7

THE DUNHOOP-MERSER PRINTING COMPANY, CHICAGO

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APPENDIX TO RESPONDENT'S BRIEF.

THE FIRST HEARING.

(Dec. 15, 1937.)

Appearances:

Albert M. Hartung, 230 Park Avenue, New York, New York, General Solicitor, Railway Express Agency, Inc.

Leo J. Hassenauer, Chicago, Illinois, Counsel for The Order of Railroad Telegraphers.

George R. Joslin, St. Louis, Missouri, Vice President of The Order of Railroad Telegraphers.

Leon L. Rice, Jr., Office of Chief Counsel, Interpretative Division, Bureau of Internal Revenue, Washington, D. C.

R. L. Cooper, Social Security Tax Unit, Bureau of Internal Revenue, Washington, D. C.

Horace A. Bacus, Research Director, representing Mr. George M. Harrison, President, Brotherhood of Railway and Steamship Clerks.

* * * * *

10 MR. PAUL GROSS, JR., a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

* * * * *

14 Q. We were also asked to furnish General Rules of the Railway Express Agency. Will you please identify this document?

A. I submit as Exhibit No. 8 a copy of "General Rules and Instructions" issued by the Railway Express Agency.

(A paper bound book of 96 pages, entitled on front cover "Railway Express Agency (Incorporated) General Rules and Instructions Railway Express Agency New York, January 1, 1936" was marked for identification "Ex. No. 8" and offered in evidence.)

Q. Please identify this document which is in four parts.

A. I submit as an exhibit consisting of four parts, Exhibit No. 9, a copy of General Rules and Instructions issued by the American Railway Express Company, bearing date New York, January 1, 1924; also Supplement No. 5, Supplement No. 6, and Supplement No. 7, issued as supplementary to the January General Rules and Instructions. I might call attention at this point that the fact that the supplements bear the name of the Railway Express Agency is because of the fact that the American Railway Ex-

15 press Company General Rules and Instructions were continued by the Railway Express Agency and these supplements were issued by the Railway Express Agency during the time in which it was in existence and were in effect until the Railway Express Agency issued the General Rules and Instructions embodied in this Exhibit No. 8.

* * * * *

16 Q. Will you please state the number of cities and towns in which the Railway Express Agency has representation and where the express rates are public?

A. The Railway Express Agency conducts its operations at 1,674 salary express agencies, that is, where the operations of the Express Agency are conducted by salaried employees exclusively. It has 16,769 joint railroad-express agencies. At the 16,769 joint railroad-express agencies 16,688 are allowed compensation on a commission basis, and at 81 of those agencies compensation is at a fixed allowance.

* * * * *

32 *Recross Examination by Mr. Hassenauer.*

Q. Mr. Gross, approximately how many joint railway-express agents are there that are on a salary basis?

A. We have no joint railway-express agents that are on a salary basis. I testified that there were 81 of a total of 16,769 who were paid at fixed allowances. They are not in the category of a salaried agent.

* * * * *

35 Examiner Schoene: As to the "exclusive agents" there is no question that they are employees?

Mr. Hartung: They are employees and their compensation is to employees and deductions are made according to the taxing clause of the Carriers Act.

* * * *

MR. W. W. OWENS, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hartung.

* * * * *

39 Q. Do you know whether or not the railroad agents do generally engage in outside activities in various towns?

A. The railroad agent in a small town is not usually confined exclusively to representing the railroad company. He will be the agent of the express company, he will handle telegrams for the telegraph company, generally sell insurance policies for an insurance company, and may sell financial paper for the American Express Company. These activities, so far as I know, are all compensated for on a commission basis.

Q. And what is the relationship of those railroad agents to the express company?

A. Well, they are purely an independent contractor.

* * * * *

A. I will state in another way. The Agency makes the best possible arrangement it can at all places where there is not sufficient business to justify the expense of an exclusive operation on a salary basis. Usually that is with the railroad agent. There is nothing compulsory about the railroad agent handling our business; many railroad agents refuse to handle express business. At such points where the volume of express business is so small that the business could very easily be handled by one person, the railroad agent will conduct the business we en-

40 deavor to have him do so, for the reasons I have explained. If the railroad agent will not handle the business, and it is of sufficient volume to justify our

deavoring to secure some other contractor on a commission basis, we endeavor to make that arrangement. There are many offices, as stated, where the railroad agent could conduct the joint operation, but where it is not done; for instance, Catlettsburg, Kentucky, I have in mind.

Q. Why wasn't that done there?

A. The express business is small at Catlettsburg and the railroad agent simply did not want to bother with it and would not handle it, but it did have enough business that we maintain a regular office there, therefore we have a salaried employee. Railroad offices frequently are closed, as an illustration, and if there is sufficient business in the community and the Railway Express Agency can obtain somebody else to handle its business as a contractor on a commission basis it endeavors to do so. I have in mind Versailles, Kentucky. The N. & W. Railroad closed its office at Versailles, and we arranged for a merchant to represent us because we thought express service was desired by that community and was of sufficient volume to justify making an arrangement with an independent contractor.

Q. Mr. Owens, at the places where the railroad agent acted as the agent of the express company does the express company exercise any jurisdiction over the hours of labor, the working conditions, the question of promotion or demotion, or with respect to anything of that kind?

A. No, it does not; the Express Agency has nothing whatever to do with the assignment of the railroad agent at that point, at any point where he may be employed. The first information we have of a change is when the railroad company notifies us that on a certain date a transfer of agents is to be made. We usually have a representative present at the time; the outgoing agent is checked out and the incoming agent is checked in; but we do not always do so, sometimes that can not be arranged. But we have nothing whatever to do with the assignment of that individual

to be the agent at the point where he goes. He obtains the position usually, I understand, by a bid on a bulletin put up by the railroad company advertising that a vacancy at a place will occur or in the case of the exercise of
41 seniority the transfer is made through what is generally known in transportation service as the "bumping" process; but the Express Agency has nothing to do with the assignment of such agents; cannot promote them, does not in any way discipline them or demote them; does not prescribe the hours or the working conditions or the salaries that the agent receives as the representative of the railroad company. The Express Agency does prescribe the rate of commission applicable to the office that may be involved.

Q. That is a matter of agreement between the agent and the Express Agency?

A. Correct; that is a matter of agreement between them.

Q. And, if I understand your testimony, if at station B on the 10th of the month the railroad company concludes to remove Mr. Jones and place that agency in charge of Mr. Smith, if the Express Agency desires to continue to have the railroad agent act as its agent it must accept the new agent appointed by the railroad company?

A. That is correct.

Q. If the Express Agency did not wish to exercise such right or privilege, what would it be necessary for the Express Agency to do?

A. It would have to find another independent contractor, or establish an exclusive salaried representative.

Mr. Hassenauer: I object to that statement. "It would have to find another independent contractor." That is another conclusion of the witness.

A. (Continuing.) That is not a conclusion; that is known by the actual facts.

Examiner Schoene: Let the record show that the Exam-

ner feels that the statement "another independent contractor" is a conclusion of the witness.

Mr. Hartung: Let us have it show that when that occurs the Express Agency could make another arrangement, either by having its own office established or by entering into a contract with some other person.

A. (Continuing:) Yes, I recall a very definite case of that kind at Roanoke, Alabama.

Q. What was done there?

42 A. We employed or secured a contractor—my recollection is he was a merchant; he was in other business anyway—to represent our company, and he represented our company in Roanoke, Alabama.

Q. And this express work was merely an incident to his other business?

A. Merely additional to his other activity.

Q. And it was only a small part of his entire business?

A. And the income from the express business was very small to his total income.

* * * * *

Cross Examination by Mr. Hassenauer.

49 Q. Mr. Owens, I call your attention to Exhibit 1, Article XI, Section 1, and note in it this language: "The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company." I call your attention to that language, "subject to the rules of the Express Company." State whether or not the rules referred to there are the rules, the General Rules and Instructions of the Railway Express Agency previously introduced as Exhibit No. 8 in this proceeding?

A. Yes.

Q. Are there any other rules included in that provision other than those in Exhibit No. 8?

A. Yes. These and other general rules for the conduct of the express business. There are rules that define the prohibition laws of various states.

Q. Are there any rules that apply to joint railway station agents?

A. Every law that applies to a common carrier by rail applies to the express agency, and where it is necessary to put that law into the possession of the company's agents, be they exclusive or contract, it has to be done.

* * * * *

Cross Examination by Mr. Bacus.

55 Q. There are some instances where the work is not turned over to the station agent, but you do turn it over to baggage-men or ticket clerks?

Mr. Hartung: Do you mean the station agent does that or do you mean that the Express Agency does that?

A. There may be a few instances where a train goes through a station when the railroad agent is not on duty where the railroad agent will make an arrangement with the porter to remove the express from the train, but the conducting of the agency is usually done by the railroad agent. There are some very few exceptions.

Q. Isn't it a matter of fact that the Railway Express Agency, in line with the agreement, exercises complete discretion in the selection of those individuals as Express agents?

A. Most emphatically they do not; they have nothing whatever to do with when a railroad appoints as agent any whom we accept as the handling agent.

Q. If the work was being improperly handled, do I u

derstand you to say that steps would be taken, possibly, to make a change in the personnel?

A. We would, of course, endeavor to have it properly handled—I referred to embezzlement—we would take the work away from him if the railroad company did not remove him.

Q. If you had an agent there who was positively inefficient and express shipments were not being handled carefully or in a proper manner, would the Railway Express Agency have authority to remove that individual and have someone else do the work?

A. We could get another contract agent.

Q. In other words, you have complete discretion in selection as well as with dismissal?

A. We do not. If we use a railroad agent we use the agent that the railroad employs. If he refuses to handle
56 the business we endeavor to make some other arrangement.

Q. If the work is not satisfactory?

A. Not necessarily. There are places where the work of the agent is not satisfactory, but he remains just the same.

* * * * *

57 Q. I would like you to explain further about the place in Kentucky—I do not recall the name of it—in which the the joint agent refused to render the service to the Express Agency.

A. He was not a joint agent.

Q. He was a railroad employee?

A. Yes.

Q. And he refused to act as joint agent?

A. That is right.

Q. What town was that?

A. Catlettsburg, Kentucky.

Q. And because he refused to be a joint agent there you have now a salaried employee instead?

A. That is right.

Q. What are his duties as a salaried employee?

A. His usual business, at this time of year, is usually to build a fire in the office.

Q. Would it be right to say that his duties are the same as those which would have been the duties of the joint agent?

A. No; the duties of the joint agent, the joint agent
58 does all of the work for the railroad company.

Q. But, so far as the Express Agency is concerned, it would be the same?

A. It would be.

Q. The man rendering service as joint agent would conduct the same business?

A. Yes, he would conduct the small amount of business that is handled at that office.

Q. Might I inquire if exclusive agents are bonded?

A. Not necessarily; some of them are and some are not. We do not as a rule bond employees with fidelity companies.

Q. Who gives orders to a joint agent; does the joint agent get his orders, with respect to service for the Express Agency, from the railroad or from the Express Agency?

A. That depends on what it is that is involved. The minutiae, the details, is with the Route Agent of the Express Agency.

Q. Would it be true to say that a railroad does not give the joint agent any orders pertaining to his service as a Railway Express agent?

A. I would not say that they give them no orders; they might; for instance, the train dispatcher might complain that the agent was not using sufficient diligence to get shipments on the train; or the train-master; or, in slang words, that he should get a move on him.

Q. That would be directing him to perform his duties as an express agent?

A. That is true.

Q. But so far as his duties as an express agent are concerned, he gets his direction from the Express Agency?

A. That is right.

* * * * *

EXHIBIT A.

72

Railway Express Agency
Incorporated

Law Department
230 Park Avenue
New York

September 3, 1937

Mr. Murray W. Latimer, Chairman,
Railroad Retirement Board,
Washington, D. C.

Dear Sir:

The Railroad Retirement Board has recently sent to the Railway Express Agency, Incorporated, a large number of the Board's Forms AA-2, requesting information respecting the amount of express commissions paid to applicants for annuities under the Railroad Retirement Act who formerly were in the employ of railroad companies and who acted as agents for the Railway Express Agency or its predecessor, the American Railway Express Company. In view of the considerable amount of labor involved in providing the requested information and the fact that the express commissions paid to such applicants can have no effect in determining the amount of the annuities to be granted them, it would seem that the Railway Express Agency properly should be relieved of the labor of furnishing the information.

These agents are not employes and the Railway Express Agency is not their employer within the provisions of the Railroad Retirement Act. Section 1 (b) and (c) of the Railroad Retirement Act in part provides:

> "(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, * * *.
>
> "(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation."

Railway Express Agency has approximately 23,000 offices and at many of these offices the volume of express business is insufficient to justify the services of an employe and arrangements are made to have the express business
73 handled by an independent contractor; a local merchant, a drayman, or more frequently by the railroad agent. For such services rendered to the Express Agency these persons usually are compensated on a commission basis. The express business handled by such persons is merely incidental to their other business or occupation and at the majority of the agencies consists of the handling only of two or three express shipments a day and at many of them is limited to the handling of only a few shipments per month.

Those persons who serve as express agents who also are railroad agents are railroad employes, subject solely to the railroad company's continuing authority to supervise and direct the manner of the service which they shall render. They are hired by the railroad company and are subject only to the authority of the railroad company with respect to promotion, discipline and dismissal. They are not subject to selection by the Express Agency nor to the exercise by the Express Agency of the normal right to hire and fire, and they are not subject to any of the rules of the Express Agency with respect to hours of service or working conditions of employes, and never have been accepted by or considered as employes of the Express Agency. They

have never been included in the various general increases and decreases in the wages of the employes of the Railway Express Agency, or its predecessor company, American Railway Express Company, and they have not been and are not included as employes in the reports of the Express Agency to the Interstate Commerce Commission.

Since the applicants in question are not employes of the Railway Express Agency it is assumed that the Railway Express Agency will not be obliged to complete Forms AA-2 with respect to commission payments, but if any other information be required or desired we shall be glad to have you so advise.

Yours truly,
(signed) A. M. Hartung

JCC/EP

EXHIBIT C.

77 Railway Express Agency

Law Department
230 Park Avenue
New York

October 29, 193[illegible]

Mr. Murray W. Latimer, Chairman,
Railroad Retirement Board,
Washington, D. C.

Dear Sir:

The efficient and economical conduct of the express business always has necessitated arrangements with individuals engaged in other fields of business to handle the very slight amount of business transacted in the smaller communities. The volume of business very frequently is insufficient to permit of engaging the services of even one employe either on a full or part time basis. Thus, Railway Express Agency maintains approximately 23,000 offices throughout the United States, and at more than 16,000 of those offices the amount of business in insufficient to justify it in maintaining a separate place of business or engaging an employe to carry on that business. To repeat a statement I made in my previous letter, in many of these offices not more than

two or three express shipments are received and delivered in one month; at others there may be five, ten or twen-
78 ty shipments a month, and, of course, at some of them, the volume is greater and daily shipments are handled. It is true that there are instances where the volume of traffic is substantial, and arrangements are made with various individuals, including railroad agents, to handle that business under contract, and to engage such assistance as they may require for that purpose. Sometimes three or four persons participate in the conduct of the business at such points, but none of those persons is an employe of the Express Agency. The independent contractor, who may carry on that business, may employ others to assist him either on a part time or full time basis; he may use his own vehicles, but he does so as an independent contractor and not as an employe of the Express Agency.

To revert again to the small offices, which constitute by far the greater percentage, it has been found expedient generally to endeavor to have the business handled at such points by the railroad agent, and under its contract with the railroad companies which is uniform, as to all of them, the railroad company permits the Express Agency to have the free use of the station and its facilities, which serve as an inducement to the Express Agency to arrange with the railroad agent to handle the express business. This arrangement is in the interest of economy, for the Express Agency otherwise would be required to own or rent other premises to carry on its business, or make other arrangements for the handling of that business. The experience and training of railroad agents in transportation matters also induce us to make such arrangements.

I note your reference to the provision of the Operating Agreement authorizing arrangements of this character and calling attention to the provision therein describing such persons as "joint employes". This incidental reference in the contract does not make such railroad agents employes of the Express Agency. Whether or not they are employes or independent contractors is dependent upon the actual situation, and the mere reference to such persons as employes would not and does not constitute them such. It is equally true that naming them independent contractors likewise would not create that relationship. The railroads and

the Express Agency in contracting for the services of their respective agents were interested when making such arrangement in providing against liability for the acts of their respective agents and employes when such agents and employes were acting for the other. In a great many cases, particularly with reference to messengers, and baggagemen, such employes actually are joint employes, and, in the interest of brevity, and for the sake of convenience, the term "joint employe" has been used broadly and not for the purpose of defining the relationship of such persons to the Railroad Company or to the Express Agency.

It is stated in your letter that the Agency is free to discontinue the services of a joint agent at any time and "has all the disciplinary powers which this power entails". It is correct to say that the Agency may discontinue the
79 services of a joint agent, but in doing so it proceeds by the termination or cancellation of a contractual arrangement and does not and may not discharge the agent. The railroad agent continues to be the railroad agent regardless of the action taken by the Express Agency. If the Express Agency chooses to terminate the arrangement it must, likewise, discontinue the handling of its business at the railroad station and establish its place of business elsewhere. To repeat, the Express Agency may not discharge the agent, and contrary to the view expressed by you, that it "has all the disciplinary powers which this power entails", it has no such authority. It may not discharge the man; it may not promote him; it may not demote him; it may not prescribe his hours of duty; it may not prescribe his working conditions, and to go back to the initiation of the arrangement, it may not select the individual; it must take the person who is the railroad agent if it desires to make a contract with him for the conduct of the express business.

Referring to another item in your letter, in which you call attention to the rules and regulations of the Company, particularly Nos. 818 to 865, an examination of those rules immediately will disclose that most of them are addressed specifically and apply only to employes of the Express Agency, and that the remaining rules, which relate to the conduct of the business with the public, apply to any person handling such business, whether he be an employe or

an independent contractor. The Express Agency is subject to the provisions of the Interstate Commerce Act; it is under the most stringent regulation as to its rates, rules and practices, and to avoid any infraction of the statutory provisions it is extremely important that it provide very definite rules governing its relation to the public. A thorough study of the rules and regulations will disclose that there is no provision therein supporting the view that railroad agents, who serve also as express agents, are employes of the Express Agency rather than independent contractors.

80 We do not mean to suggest that the fact such agents are paid by commission affects the relationship. The Express Agency has in its employ some agents paid by commission who give their entire working time to the Express Agency. These men are employes and have been so treated by the Express Agency with respect to the Retirement Act, with respect to working conditions, and with respect to all matters pertaining to employes, including the right to hire and fire, the right to promote and demote, and the right to discipline in all respects afforded by the relationship of master and servant. We contend that only those agents whose express activities are incidental to their regular business or employment, who have agreed to perform certain services for the Express Agency for a stipulated consideration, and who have control of themselves and their helpers within reasonable limits as to the time of performance and the precise method of procedure to be followed in completing a task are independent contracts. To hold such agents as employees of the Express Agency is to prohibit the Express Agency from letting out to independent contractors its work at stations where as little as two shipments a day, and in some cases even less, are handled, which is impractical, and to our view not intended by Congress as we interpret the language of the act.

This matter is of much importance to us, and because thereof we should like, if possible, to confer with you upon the subject. Further, if ultimately you should still feel that these agents are employes, we desire that you issue a formal order so that we may obtain an adjudication of the status of these agents by the Federal Court as provided by Section 11 of Part 1 of the Retirement Act.

Yours very truly,

(signed) Albert M. Hartung.

EXHIBIT 1.

Standard Form of Agreement Between Railroads and Railway Express Agency, Effective March 1, 1929.

84 This Agreement, made as of March 1, 1929, between hereinafter called the "Rail Company", and the Railway Express Agency, Incorporated, a corporation of the State of Delaware, hereinafter referred to as the "Express Company", Witnesseth:—

86 Article II. Sec. 1. The Rail Company hereby constitutes and appoints the Express Company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company, and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained.

90 Article III. Sec. 5. The Rail Company agrees to stop its trains at stations where they are scheduled to stop in such a manner and for such time as will permit the Express Company by due diligence, and with sufficient force, to load on and to unload from trains all express matter carried or to be carried on such trains as will not unreasonably interfere with other business of the Rail Company, and, under like conditions, the Rail Company shall provide the Express Company, without compensation other than that provided in Articles IV and V, access to and from station platforms, trains and terminals, for its employes,

vehicles and other conveyances for the handling, loading and unloading of property or express matter carried or to be carried on trains of the Rail Company.

Article IV. Sec. 1. In cases where an employe of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences, such as heat, light, and use of telephone at station, without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.

102 Article VI. The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business as agent of the Rail Company; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company.

105 Article XI. Sec. 1. The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, and the Rail Company may arrange with the Express Company for the agents and express messengers and other employees of the Express Company to act as station or train employees of the Rail Company, subject to the rules of the Rail Company, upon such terms as may be agreed upon by the two companies.

107 Article XII. The Express Company shall load and unload express matter transported under this agreement, or require the shippers and consignees to do so.

Article XIII. All of the agents and employees of the Express Company while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon, and in case any messenger or other employe on any said lines shall from any cause be objectionable to the Rail Company, he shall be removed or discharged upon the written request of the Rail Company or of the Rail Company's principal operating representative.

EXHIBIT 8.

General Rules and Instructions.

(1936 Edition.)

256 Notice to Employes.

The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.

Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.

These Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. At offices where the use of special forms of waybills, delivery sheets, etc., has been authorized, employes will be governed by the instructions issued in connection with such special forms.

Special instructions heretofore issued by circulars, unless superseded by rules laid down in this book, remain in force.

257 General Remarks.

The business of the Company is to forward by rapid conveyance, shipments of Merchandise, Perishable Freight, Live Stock, Live Animals, Jewelry, Bullion, Coin, Currency, Bonds, Valuable Papers, etc., and to deliver same promptly; to make collections with or without goods; to fill orders; to attend to commissions; and to sell and pay money orders, travelers' cheques, etc.

The express business being eminently one of detail, requires system, accuracy, diligence and courtesy from every one engaged in it, and above all, that the business of today be done before tomorrow. The Company's relations with its patrons must be treated as strictly confidential; those who entrust their business to it, do so with the belief that its service is safe and efficient. Each employe should put forth his best efforts to avoid causes of dissatisfaction to the public or loss to the Company, and to maintain the highest standard of express service. A satisfied patron is the company's best asset.

258 [Rule] 1. The unit of express operation is the local office or agency. The responsible official in charge of every express office is the agent, or in his absence the duly authorized acting agent.

311 [Rule] 794. The Company's General Rules and Instructions appearing in this book and Supplements thereto, also Operating Department General Circulars, must be faithfully and uniformly observed in transacting the Company's business.

[Extensive excerpts from Exhibit 8, the 1936 edition of the "General Rules and Instructions", were included in the Examiners' Reports and are printed in Petitioner's Appendix at pages 58-61, 62, 658-669, 732-3.]

BRIEF OF PETITIONER.

506 On cross examination, it was brought out that a joint-railroad-express agent was furnished the forms used in carrying on the express business and in making his periodical reports and, further, that he in transacting the express business was subject to the rules and regulations of the Express Agency, particularly the General Rules and Instructions (Exhibit 8, Rec., p. 10), (Rec., pp. 20, 21, 28, 29, 30, 43).

The Express Agency and all persons doing its business, whether they be employees or independent con-507 tractors, are required to use the uniform express receipt in effect and on file with the Interstate Commerce Commission. *Adams Express Co. v. Croninger*, 226 U. S. 491. For more than thirty years express companies have been subject to regulation by the Interstate Commerce Commission and State Commissions. Their rates for the most part have been fixed by the Commission: *Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 381; 28 I. C. C. 131; 35 I. C. C. 3; *Proposed Increase in Express Rates*, 50 I. C. C. 385; *In Re Increase in Express Rates*, 51 I. C. C. 263; *Express Rates, 1920*, 58 I. C. C. 281, 58 I. C. C. 707; *Express Rates, 1922*, 83 I. C. C. 606. The Official Express Classification, the Uniform Express Receipt, the waybills and labels, and the manner and method of presenting, marking, packing and delivering property for transportation by express, have been prescribed by the Commission: *Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 381; 28 I. C. C. 131; *Released Rates*, 43 I. C. C. 510. A uniform system of accounting also has been prescribed by the Commission for the express companies, as have been their depreciation charges: *Depreciation Charges of Express Companies*, 215 I. C. C. 629; and all the transportation services of the express companies, are subject wholly to the direction and regulation of the Commission, and the Commission repeatedly has exercised such jurisdiction.

PETITIONER'S ORAL ARGUMENT BEFORE THE EXAMINER.

(January 17, 1938.)

570 Mr. Hartung: * * * I think all present know from their own experience that in the smaller towns, over a long period of years, the railroad agent very frequently not only was the railroad agent and the express agent, not only did he send Western Union telegrams, but also he was, perhaps, the principal coal dealer of the town; very often he had three or four of these activities in addition to his railroad duties.

571 * * * Therefore, what is the difference between the relation, the status, which the country storekeeper

572 or the drayman has and that which the railroad agent has to the express company? They are required to perform exactly the same duties; they use exactly the same forms, they are required to make the same reports, they are compensated on the same basis.

575 The agent is told "When you receive a shipment you must use the uniform express receipts, because by the law that is the only kind which the company may issue." There are instructions as to the charges because under the law the express company is required to collect a definite fixed charge and no more and no less. The express company performs a C. O. D. service and these services, whether the employees are independent contractors, whether exclusive agents of the express company, or whether joint agents of the railroad and the express company, or merchants, or draymen, whether this shipment is received at one or the other of these places, the same rules are followed.

576 * * * There is no requirement that the agent perform that duty himself, that a joint railroad agent

shall continue that business himself, and as a matter of fact, commonly the agent does not do it himself but someone who works for him does a great deal of that work.

594 As to the testimony of Mr. Owens as to the express company being concerned as to whether the business was handled efficiently but not as to whether it was handled economically, that means merely this: If the employee

595 of an express company handled that business, the express company would be directly interested in the amount which it cost to handle that business. If the express company should have an employee at a station who said he needed three more men to help him rather than two more men, the express company would have to shoulder the difference between the salaries of two and three more men, but if the business is handled by a commission agent who secures his compensation by commission by a percentage of the express charges, then it does not make any difference to the express company whether he uses two men or three men or six men, because he pays the difference. The express company, however, like the man, is interested in the question of whether that business is handled efficiently. You would not make a contract with a man to handle some business for you if he did it in such a way as to displease your customers, and we insist upon our business being handled in such a way that the shipper will continue to use our business and not turn it over to a competitor.

The same form of application is taken from all persons whether they be railroad agents or draymen or store-keepers. I think Mr. Hassenauer's argument might be construed as indicating that there is some distinction, but there is no distinction; it is taken from all these people. As to a question you asked, Mr. Examiner, as to whether those arrangements are made often or to what extent, they are quite common and change from one

to another depending upon the business need. Mr. Owens testified as to one place where the railroad agent did not wish to handle the express business and the express company made an agreement with a local merchant, I think, for the express business. Now that local merchant handles

that express business as a side-line just the same as
596 the railroad agent handles it as a side-line. He handles

it as an independent *contractor, just as the railroad* agent handles it as an independent contractor. The relationship in every instance is the same, made in the same way, subject to exactly the same requirements, whether the man be a railroad agent, or a drayman or a store-keeper; he must use the same form of receipt, collect the same charges, make the same reports, receive the same rate of commission. The checking of his accounts from time to time is just the same as the railroad agent's; the supervision, if you choose to call it that, is the same in

one case as another.

597 * * * but whether the arrangement is made with a

joint railroad agent or a drayman or a store-keeper, all the conditions which exist are the same. Now that is highly important and significant, because if you hold that the railroad agent who serves also as an express agent, is an employee of the express company within the meaning of the Railroad Retirement Act, then you mu t hold likewise that that drayman or that country store-keeper is an employee of the express company.

THE SECOND HEARING.

(August 5, 1938.)

MR. RALPH J. GREGORY, a witness produced by the Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

717 My name is Ralph J. Gregory, 3252 Maple Avenue, Cicero, Illinois. I am joint agent for the Chicago, Burlington and Quincy Railroad and Railway Express Agency at Cicero. I have been handling express since August, 1928. I entered service in 1916, and was a tower man prior to August, 1928, when I bid in on the station job.

* * * * *

719 When I took over these duties as a joint railroad express agent the Railway Express Agency put me on a salary basis * * *. This continued until June, 1933, when I was taken off a salary basis and put on commission basis.

* * * * *

Q. At the time you were working on a salary basis, did you receive letters of instructions and circulars addressed to you as agent or commission agent at that station?

* * * * *

A. Yes.

Q. Since you were put on a commission basis were the reports you made to the Railway Express Agency checked over by the route agent?

A. The office is checked two or three times a year now, the same as it was when I was on a salary basis.

* * * * *

722 Q. You testified a moment ago that you had been receiving circular instructions from the Railway Express Agency during the period of time, Mr. Gregory, you were employed on a salary basis and also on a commission basis. I will now hand you Railroad Telegraphers' Exhibit marked number 1 for identification and ask you to identify this Exhibit.

A. I received that.

Q. Now, instead of reading the entire *Exhibit*, will you state briefly the instructions contained thereupon of which you took note.

. . . . .

Examiner Schoene: We will identify it as Exhibit No. 1-B.

. . . . .

A. Bulletin 61, dated January 26, 1937, consists of nine pages, signed by I. Longaker. My attention has been called on page three of the instructions to rule 355 of General Rules and Instructions with regard to Re-Marking and Waybilling shipments. In addition to that instruction
723 contained in the Bulletin, there were not less than fourteen specific items to which my attention was called for the purpose of conducting the express business.

. . . . .

A. In another circular dated February 26, 1937, also signed by Mr. Longaker, my attention was called to Rules 638, 639 and 650 of the General Rules and Instructions, more particularly with respect to the care and protection of money and valuables, and it pointed out more specifically that I give special attention to rules 610 to 650, inclusive, of the General Rules and Instructions.

. . . . .

A. In Bulletin 34, dated November 6, 1935, my attention was called to rule with regard to delivery of in bond shipments and to the fact that since the discontinuance of

rule 787 of General Rules, I should carefully read rules 354 to 358 inclusive and in particular, rules 357 and 358. This bulletin consists of four pages and contains six additional instructions.

• • • • •

724 A. In the circular of instructions dated June 24, 1936, entitled "Handling Freight Values" my attention was called to Freight Value Rule 787 (new rule 715) calling attention to the fact that the Railway Express Agency had been experiencing substantial increases in claims paid for loss of liquor shipments and because of delay to shipments of films. The superintendent did not see why if the above instructions were carried out there should be any losses or delay.

• • • • •

A. In the circular of instructions dated December 17, 1934, also issued by the superintendent, my attention was called to the loss and damage in delivery of express shipments and in particular to carrying out rules 286 and 306 of the General Rules and Instructions and it further called my attention to reading carefully rules 286 to 358 inclusive of the same general rules.

• • • • •

A. In the instructions dated August 22, 1934, I was instructed, among other things, that in notifying shippers regarding express shipments destroyed in transit, instructions regarding such notification are contained in Item 4 of Operating Dept. General Circular No. 8 or in the event I did not have same, instructions would be found in rule 1513 in supplement No. 6 to General Rules and Instructions.

• • • • •

A. Instructions dated July 31, 1934. On page 725 three my attention was called to proper placing of wrappers and shipments of baggage, and more spe-

cifically to Rule No. 48 of the General Rules and Instruc
tions.

. . . . . .

727 A. Instructions dated October 3, 1934, also receive
from the Superintendent. I was instructed that Form
94 and 94-S must in all cases be submitted to the Assistan
Treasurer in duplicate.

. . . . . .

728 A. In the Instructions dated September 27, 193
my attention was called among other subjects co
tained in that Instruction, to the new method of payin
C. O. D.'s and the private express statutes, and more pa
ticularly to familiarizing myself with rules 1075 to 10
of the General Rules and Instructions.

. . . . . .

A. Instructions dated September 27, 1934, entitl
"Trustee Proceeds Served on the Company to Rea
C.O.D Proceeds". I was instructed that it was the utmo
importance that when money involved in C.O.D. tran
729 actions is attached, the Assistant Treasurer at Ne
York, as well as the Chicago office, must be notified
the quickest means possible.

. . . . . .

A. In a circular dated April 1, 1937, entitled "Loss a
Damage Prevention Campaign", my attention was call
to a circular letter issued by Superintendent Longak
March 23, 1937, in which I was asked to prepare and se
in, without fail, a copy of every exception and inspecti
report made to my office, and the more I tell the Super
tendent on the reports, the better results will be obtain
in the analysis.

. . . . . .

Cross-Examination by Mr. Hartung.

734 I obtained the job as Cicero agent of the C. B. & Q. RR. in 1928 by bidding on the position when it was bulletined by the railroad. Being the senior applicant, I got the job. The agency was a joint agency with the express company, and the previous agent had been agent for the railroad and the express company. The bulletin advertised the position of agent for the railroad at Cicero.

* * * * *

734, 735 When I became agent at Cicero, the route agent turned the express business over to me for handling; that was a part of the position I went to. I was checked in by the route agent and the railroad. They were both there. It was a joint check. Each made his own check.

* * * * *

735, 736 While I was on a salary basis I was paid out of the station funds, accounting for it as the salary of agent, and I deducted the salary from the remittance due the express company. After 1933, when on a commission basis, my commission was also taken from the station funds at the rate of ten per cent. * * * I did not get a vacation.

737 While here at the hearing, I am being relieved on the job by an extra agent, a railroad man, who has worked the position before.

* * * * *

Redirect Examination by Mr. Hassenauer.

738 I had no difficulty arranging to be absent from work to come here.

Q. Did you ask any one connected with the Railway Express Agency?

A. I asked the railroad company.

Q. It is not necessary to ask any one connected with the Railway Express Agency?

A. They are informed by the railroad company that I am going to be off.

739 Q. That is your surmise, Mr. Gregory?

A. Yes, that is my surmise.

* * * * *

MR. CHARLES W. HAZEN, a witness produced by the Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

739 My name is Charles W. Hazen, I am agent for the New York Central Railroad and also for the Railway Express Agency, at Madison, Ohio. I had been an agent at Saybrook, Ohio for 7 years, then at Unionville, Ohio, for 23½ years, then transferred from Unionville to Madison on July 15, 1937. I got the job at Madison because the agent there retired, the railroad published a

740 notice, and I bid on the job. * * * I handled express at Unionville until the agency there was discontinued June 1, 1936. * * * Commissions at Madison average $25 a month.

After bidding in the Madison agency I was compelled to fill out an application for employment and for fidelity bond, for the Railway Express Agency, just the same as any new employee. The application was presented to me, and the questions in it were put to me, by the Route

741 Agent. I signed the application. The same for the application for a fidelity bond. * * * The population of Madison is approximately 1,500 to 2,000. There is one train a day there, at 9:41 a.m., and all express going out and coming in is handled by that one train. An express company employee picks up and delivers in a truck. He receives four per cent commission for that service. My

only connection with that service is making out a voucher of the express business at Madison which is sent to the superintendent's office at Cleveland, and he is paid direct from the superintendent's office.

I have not been given authority by anyone connected with the Railway Express Company to appear here.

742 Q. You have heard the testimony of Mr. Gregory with respect to these circulars issued and which he received. Have you received similar instructions during the time you acted as agent for the Express Agency?

A. I received circulars from a different superintendent's office and part of them are identically the same. The others I would not be interested in.

Q. What is your practice upon receiving regulations and instructions that effect any change in the general rules?

A. Any general instruction is filed and all supplements are filed, or cancelled by the revised ones and filed with it.

Q. Do you have a book of general rules and instructions?

A. Yes. Any general instruction is in the book. A supplement goes with the general instructions, which are in book form.

Q. Do you ever have occasion to expose the general rules and instructions which are maintained by you for examination by the route agent.

A. Yes. The route agent checks those.

Q. How many times does he call at your office for examination of your accounts?

A. Probably twice a year. It might happen three times a year.

Cross-Examination by Mr. Hartung.

* * * * * *

743 The express agency at Unionville was abolished because the trains did not stop there. My bid for the job at Madison was made to the railroad's Chief Dispatcher.

Q. As I understand, you testified there is one train a day at Madison on which express is transported?

A. That arrives at 9:41 in the morning. Yes.

Q. How long do you consume in looking after the express at that time?

A. I am there eight hours a day until five in the afternoon as railroad agent and express agent.

Q. I want to know how much time you spend in handling express business?

A. Eight hours a day.

Q. How much time do you actually work handling express?

Mr. Hassenauer: He has answered that question, Mr. Examiner.

Examiner Schoene: I think it is fairly apparent that the witness cannot spend eight hours in the same day working for both the express company and the railroad company; therefore, he should be more explicit as to the time devoted to one service or the other.

Q. What do you do for the express company?

A. I do all that is required to take care of the business. Some days I receive three shipments a day, some days fifteen. They all come on the same train. There are
744 separate cars for express and for baggage, and I load and unload baggage and express. The length of the train stop depends on how much baggage and express there is. Sometimes it is only a couple of minutes, sometimes five. After the train leaves I put the express in the

express room, which is really the baggage room. I don't often move it in on a truck; I take it off the truck outside of the door and put it in. The delivery man has a small area in the business section of town which is, I might say, two blocks. It is a country town. He delivers in that area and picks up. Anything outside of that, they come get it.

The amount of compensation I get from the express company is regulated by the revenue on those shipments. You might have one shipment on which the charges are thirty-five cents or you might have one that would be fourteen or fifteen dollars. The average charge on express shipments is about $1.10 to $1.20. Perhaps at times it would be a little more.

745 I am supposed to handle the mail from that train but I don't always do it. I have a man carry the mail part of the time. He puts the mail on the train and takes it off.

Q. Did you get permission to be here today?

A. Yes, from the Chief Dispatcher of the New York Central Railroad Company.

Q. Is he the person to whom you apply when you want leave of absence or to whom you report?

A. Either to him or to the superintendent.

Q. That has been true at Madison, Unionville and Saybrook, is that right?

A. I never have left the office yet without permission from the railroad official in charge.

Redirect Examination by Mr. Hassenauer.

I am available to handle express business at Madison 8 hours a day, and I am also available to handle railroad business during that time. And at Unionville, after ceasing to handle express business, I continued to handle the railroad business 8 hours a day.

• • • • •

Recross Examination by Mr. Schreiber.

746 Whenever I want to leave the service temporarily, say to take off a day, the railroad company makes the arrangements for a substitute. The railroad has a relief agent. I advise the railroad and it makes the arrangements for a substitute. There is no one else representing the Express Agency on the premises.

747 Q. Is there anyone representing the Express Agency to whom you could address yourself if you wish to be relieved from service—that is, is there anyone there in connection with your work to whom you could address yourself if you wish to be relieved from the services?

A. No.

Q. Do you know whether there is an arrangement with the Express Agency and the railroad whereby the railroad arranges for someone to substitute for you when you leave the service temporarily?

A. No.

Q. All you know is that you advise the railroad and they arrange for someone to take your place?

A. Yes.

By Examiner Schoene:

Q. When you transferred from Saybrook to Unionville I understood you to say you did not fill out an application for employment and fidelity bond with the Railway Express Agency?

A. That is correct.

Q. You were checked in, however? By the railroad and the express company?

A. Yes.

• • • • •

MR. GEORGE E. JOSLIN, a witness introduced by the Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

748 *Direct Examination by Mr. Hassenauer.*

749 My name is George E. Joslin. I am Acting Vice President of the Order of Railroad Telegraphers. I testified previously in this case. My duties are those which are especially assigned to me by Mr. E. J. Manion, President, and I have been placed in full charge of those matters affecting joint railway express agents.

Upon being notified that there was to be a rehearing, I addressed a letter to several General Chairmen in the various departments of the territory in which the Railway Express Agency operates, requesting them to report to my office in St. Louis all of the information which my
750 letter requested them to obtain. * * * In addition, I personally interviewed several of the joint railway express agents in Indiana, Illinois, Ohio and Missouri. I discovered that they had been receiving orders practically identical with those which other joint railway express agents had received, and that the Railway Express Agency's method of instructing the joint railway express agents was more or less uniform.

* * * * *

Q. You have heard the testimony of Mr. Gregory and Mr. Hazen. State whether or not the testimony which they introduced regarding the instructions received from the Railway Express Agency is identical with that which you received from the General Chairmen in answer to your letter previously referred to?

A. Yes, it is and in addition thereto the General Chairmen obtained from the various joint railway express agents, additional instructions similar in scope providing that

751 the express agency has control and direction not only of the work and performance and its results, but of its detail and method and which additional instructions I will introduce as Exhibits.

Q. Mr. Joslin, I hand you Exhibit No. 2-B for identification.

A. I will identify this document as The Order of Railroad Telegraphers' Exhibit 2-B, consisting of approximately fifteen pages which is made up of circular instructions received by the joint railway express agents from the various superintendents, and other executive officers and officials of that company.

* * * * *

Examiner Schoene: Received in evidence as Exhibit No. 2-B. (Order of Railroad Telegraphers Employees' Exhibit No. 2-B, consisting of the following (19 pages), received in evidence:

Circular No. 89, addressed to All Agents, dated July 3, 1936, signed E. E. Honn, Superintendent.

Letter addressed to all Commission Agents, Subject: Revised forms May, 1935, Reports, dated May 28, 1935, signed W. S. McNutt, District Accountant.

Circular No. 121, addressed to All Agents, dated December 30, 1937, signed W. W. Argabrite, Superintendent.

Letter addressed to Agents at 17 towns, dated December 24, 1937, signed W. W. Argabrite, Superintendent.

Letter addressed to Agents at 17 towns, dated December 24, 1937, signed W. W. Argabrite, Superintendent.

Letter addressed to Agents at 5 towns, dated January 28, 1938, signed by C. I. Fitzgerald, Superintendent.

Circular No. 72, addressed to Agents at Commission Offices, dated April 27, 1935, signed by W. E. Carpenter Superintendent.

Circular No. 13, addressed to All Agents, dated January 28, 1936, signed by W. E. Carpenter, Superintendent.

752 Circular No. 123, addressed to All Agents, dated September 30, 1937, signed by W. E. Carpenter, Superintendent.

Joint Supts' Circular #36 All Agents, signed by five Superintendents, dated March 23, 1938.

Circular No. 5, addressed to All Agents, signed by C. I. Fitzgerald, Superintendent, dated January 21, 1938.

Letter to All Agents, dated December 10, 1937, signed by V. R. Burton, Superintendent.

Letter to All Agents and Messengers, dated December 1, 1937, signed by V. R. Burton, Superintendent (2 pages).

Letter to All Agents and Messengers, dated December 10, 1937, signed by V. R. Burton, Superintendent.

Letter to Mr. Commission Agent, dated February 27, 1935, signed by W. J. Martindale, Traffic Agent (4 pages).

* * * * *

779 In 1924 a dispute arose between the Order of Railroad Telegraphers and the Chicago and North Western Railroad Company. The dispute concerned instructions given certain joint agents by the American Railway Express Company to meet trains carrying express after the railroad station had closed for the day. After a conference, Mr. Walliser, the railroad's Superintendent, wrote Mr. Boyington, the union's General Chairman, a letter dated May 2, 1924, in which he said, in part:

780 "* * * Agents handling express on a commission basis or otherwise are joint employes with the American Railway Express Company and as such are subject to American Railway Express Company's rules and regulations and compliance with special instructions issued by the Express Company's officers. * * *"

* * * * *

EXHIBIT 1-A.

796 Railway Express Agency
Incorporated

Statement showing the number of Merchant Agents, who serve the railroads and Express Agency, receiving varying amounts of commission for the month of March, 1937:

Amount of Commission			Number of Offices	Percentage of Total No. of Offices	Accumulated Percentage
$1.00 and under			147	37.98	37.98
Over $ 1.00	not over	$ 2.00	32	21.19	59.17
Over 2.00	not over	3.00	42	10.85	70.02
Over 3.00	not over	4.00	25	06.46	76.48
Over 4.00	not over	5.00	15	03.88	80.36
Over 5.00	not over	6.00	11	02.84	83.20
Over 6.00	not over	7.00	13	03.36	86.56
Over 7.00	not over	7.50	9	02.33	88.89
Over 7.50	not over	8.00	4	01.03	89.92
Over 8.00	not over	9.00	7	01.81	91.73
Over 9.00	not over	10.00	4	01.03	92.76
Over 10.00	not over	25.00	11	02.84	95.60
Over 25.00	not over	50.00	6	01.55	97.15
Over 50.00	not over	100.00	8	02.07	99.22
Over 100.00	not over	150.00	1	00.26	99.48
Over 150.00	not over	250.00	0	—	99.48
Over 250.00			2	00.52	100.00
Total			387	100.00	

EXHIBIT 3-A.

799 Railway Express Agency
Incorporated

Statement showing the number of Express Merchant Agents, who do not serve railroads, receiving varying amounts of commission for the month of March, 1937:

Amount of Commission	Number of Offices	Percentage of Total No. of Offices	Accumulated Percentage
$1.00 and under	163	15.07	15.07
Over $ 1.00 not over $ 2.00	98	09.06	24.13
Over 2.00 not over 3.00	76	07.02	31.15
Over 3.00 not over 4.00	55	05.08	36.23
Over 4.00 not over 5.00	59	05.45	41.68
Over 5.00 not over 6.00	45	04.16	45.84
Over 6.00 not over 7.00	34	03.14	48.98
Over 7.00 not over 7.50	14	01.29	50.27
Over 7.50 not over 8.00	18	01.66	51.93
Over 8.00 not over 9.00	21	01.94	53.87
Over 9.00 not over 10.00	24	02.22	56.09
Over 10.00 not over 25.00	167	15.44	71.53
Over 25.00 not over 50.00	104	09.61	81.14
Over 50.00 not over 100.00	109	10.07	91.21
Over 100.00 not over 150.00	45	04.16	95.37
Over 150.00 not over 250.00	35	03.24	98.61
Over 250.00	15	01.39	100.00
Total	1,082	100.00	

EXHIBIT 1-B.

(Part 1.)

812 Railway Express Agency
(Incorporated)

Chicago, Ill., January 26, 1937.

Bulletin No. 61.

All Agents:

813 Preservation of Original Marks on Returned Shipments.

Complaints have been received from shippers because of complete obliteration of original marks on express shipments returned to them. Very often, destination Agent when returning such shipments, pastes the waybill or labels immediately over the original shipping marks with the result, the original shipper is unable to identify the shipment when it is returned.

814 Rule 355 of General Rules and Instructions reads:

> "355. *Re-Marking and Waybilling:* Shipments returned or reforwarded should be addressed with reforwarding label, Form 820, completely filled out, leaving the original address and labels crossed off but not entirely erased. Each shipment should be weighed at time of re-billing."

It is necessary all concerned observe instructions in above quoted rule when returning shipments to original shipper. Under no circumstances must waybills or labels be passed over original marks.

Lost or Stolen Financial Paper.

The following Domestic Money Orders have either been lost or stolen from our Faxon, Oklahoma office:

AA-7132246 to 59 Inclusive

On January 3, 1937 the express office at Washington, N. C. was burglarized by unkown parties and blank money orders Nos. 6139077 to 6139079, inclusive of $50.00 denominations, were stolen.

Please be on the lookout for this paper and notify banks, hotels, merchants and garages and anyone else to whom it might likely be presented.

If the paper is presented, payment should be refused, paper taken up and if necessary, receipt given for same, except when presented by a bank, then write the words "Payment Stopped" across face of paper and return to bank unpaid. Persons who present such paper should be kept under surveillance and this office promptly advised, using telegraph or telephone when necessary.

815 Liquor Regulations—State of Florida.

A local option election was recently held in Union County, Florida, and as a result the points in that County are now in "wet" territory. The following express agencies should therefore be eliminated from Paragraph 6, Page 5 of General Circular No. 11-E, pending publication of an early supplement:

Dukes Lake Butler Raiford
Worthington Springs

Liquor Laws—State of South Carolina.

The following instructions should be substituted for those now appearing under South Carolina on Page 11 of General Circular No. 11E—

1. Alcoholic Liquor means any spiritous, malt, vinous, fermented, brewed, or other liquors (except as shown in Paragraph 2).

2. Beer, Ale, Porter, and all other similar malt or fermented beverages containing not more than 5% of alcohol by weight and all domestic wine containing not more than 14% by weight and not considered intoxicating and may be transported into and within South Carolina in accordance with provisions of the General Instructions in Section 2.

3. Intoxicating Liquors may not be shipped into South Carolina from outside the state except when consigned to a wholesale dealer licensed under the South Carolina Tax Commission.

4. When the transportation is wholly within the State of South Carolina shipments may be made:—

(A) From a manufacturer to a wholesaler;

(B) From a Wholesaler to a Retailer;

(C) From a Retailer to a private person when the shipment is picked up by the carrier from the Retailer's place of business and is not shipped C. O. D.

(D) It is lawful for a private person to ship alcholic liquors intrastate in South Carolina when such liquors have affixed thereto the required South Carolina stamp.

816 5. Although shipments of liquor consigned to a private person may not move intrastate in South Carolina as a C. O. D. shipment, nevertheless, a shipment from a manufacturer to a wholesaler or from a wholesaler to a retailer may be made C. O. D. when the movement is wholly within the State.

Loss and Damage—Abolishing of Freight Value Rules.

As a result of the change in instructions regarding handling of freight values, not only are a greater number of these shipments lost in transit, but also, under the new plan, they are being so handled as to result in a considerable increase in damage.

Statement prepared by the Accounting Department showing claims paid in October, 1936, on shipments classified as "Freight Values" prior to the revision of Rule 787 of General Rules and Instructions, presents for serious consideration the following outstanding figures:

	Loss	Damage	Misc.	Total	Inc. over Oct. 1935
Liquor	$ 248.00	$ 330.01	$ 6.47	$ 584.48	$ 106.32
Raw Furs	90.42	22.45	2.10	114.97	40.42
Small Arms	522.65	135.60		658.25	474.82
X-Ray Tubes		1192.19		1192.19	873.14
Misc.-Value over $5.00 per lb. and over $100.00	3377.64	2764.84	75.59	6218.07	3695.83

It is difficult to understand why these shipments, particularly X-Ray tubes are not being handled as carefully as they were when a hand to hand receipt w s taken for them. The containers are plainly marked to show contents.

Just because a shipment is not handled under receipt should not prevent its receiving such care and attention as is warranted by the nature or value of it, and it does not seem reasonable that these shipments should receive rough or improper handling because we are not able to establish, by record, the name of the employe handling. All concerned must be instructed to handle shipments formerly classified as freight values in such manner as to eliminate the possibility of their becoming lost or damaged.

817 **Complaint of the Supreme Instruments Corp., Greenwood, Miss.**

In Bulletin No. 60 dated December 18, 1936, attention was called to difficulties experienced in the handling of shipments from the Supreme Instruments Corp., Greenwood, Miss. because of failure of Agents to comply with instructions surrounding the execution of their conditional sales contract.

Further serious complaint has been made, and unless there is immediate improvement in our handling and complying with shipper's instructions, we will lose all their business. In fact, some of it has already been taken from us.

818 Shipper states they have always had considerable difficulty with our offices all over the country in the handling of their contract shipments, and for the past few months the service, instead of improving, has become worse—so bad in fact, they have decided to discontinue further shipments to our offices who are the worst offenders.

Regardless of all instructions that have been issued, our people mishandle about 25% of these shipments. Apparently shipments are permitted to get into the hands of the deliveryman without sufficient information or if they have sufficient information, they disregard what should be very plain instructions.

Of one thousand shipments recently forwarded in our service, 25% or 250 of this thousand have been improperly handled in some manner.

The following is quoted from letter written by our Superintendent at Memphis, Tenn. who enumerates the principal trouble to be as follows:

1st—contract not executed.

2nd—when executed, improperly signed. The contract plainly stipulates that it must have the genuine signature of the consignee. Our deliverymen will accept the signature of a servant or most anyone, being willing to accept on the sales contract the signature of most anyone whose signature they would accept for the delivery of an ordinary express shipment. This, of course, makes necessary the return and further handling of each such improperly executed contracts.

3rd—contract returned by the consignee direct to the shipper, and this is the most prolific source of trouble. Our deliverymen will have the contract signed and leave it with the consignee to do as he pleases about it. Consignee may return it by U. S. Mail some time, or may not return it at all. It is hard to understand why any deliveryman with sufficient instructions and intelligence to deliver our traffic would not take this properly executed contract and settle it with his day's business and receive the proper 35¢ charge for the return of the instrument, and it is further hard to understand why our settlement people will allow this kind of settlement to be made without some inquiry or checkup as to why the contract is not returned.

819 4th—the contract is improperly executed in that it is not witnessed or dated.

5th—there are a large number of these contracts that are never returned, wholly lost, and we can find no record of them, entailing correspondence concerning them.

6th—each contract forwarded plainly requires the service charge to be paid by the consignee. In too many cases the charge is not collected; we promptly refund to the Supreme Instruments Corp., charge back to the delivering office and they then go out and collect from the receiver, who promptly deducts from the Supreme Instrument Corp. and starts a line of correspondence and complaint.

There are moving now some 100 to 150 of these shipments daily, and our revenue is running between $1,500.00 and $2,000.00 a month and this is a business that we can well afford to take care of.

The instructions which accompany these shipments are very explicit and it is important they be followed to the letter. Agents receiving any such shipments must carefully read and understand shippers instructions before attempting to make delivery. Wherever possible to do so, the consignee should be called on the telephone before shipment is sent out for delivery to make sure that he or the person who is to personally sign the contract is at the address shown.

Shipments of Radioactive Minerals Radium, Thorium, or any other Radioactive Substance, or any Materials containing Radioactive Substances, such as Powders, Containing Radium or Thorium, Liquids Containing Radium Emanation, Radium Salts, Radioactive Minerals, or any Radioactive Material Whatever.

Express service is now being used to a great extent for the transportation of radioactive substances. These materials are shipped in lead containers which, it is understood, are sufficient to protect the individual from any harmful effects, but not sufficient to prevent so-called fogging of sensitized photographic, moving picture or X-Ray film.

820 In handling this traffic the following procedure should be followed:

Shippers should be required to conspicuously label shipments in such manner that employes handling may readily observe the nature of contents.

Agency and train employes, including Baggage Master, Messengers, should be made fully aware of the need of

keeping such shipments separate and apart from all other traffic and should not load such shipments in cars, on station, warehouse or motor trucks, nor in platform assortments within 10 feet of any shipment of Undeveloped photographic, moving picture or X-Ray film.

In handling it would be well for employes to pass word, man to man, of the nature of such shipments in order that they may be handled as outlined.

These emergency shipments Must Be Handled Without Delay.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 2.)

822 Railway Express Agency, Inc.
Chicago, Illinois

All Agents: February 26, 1937.

Care and Protection of Money and Valuables.

The care and protection of money and valuables is a very important part of our duties and I wish to bring to your attention, the necessity of surrounding our operations in connection with their handling to insure the greatest possible secrecy.

Of utmost importance are Rules 638, 639 and 650 of our General Rules and Instructions, which I am quoting for your ready reference:

"638. Packages of money, jewelry, etc., not exceeding $2000.00 passing between the city office and depot, may be handled in safes unaccompanied by a guard,

but packages of greater value should be accompanied by a reliable employe as guard, in addition to driver.

"639. In delivering currency, securities, jewelry, etc., valued at $2000.00 or more, a reliable employe to act as guard must accompany the money deliveryman to place of delivery.

"650. When but one man is employed on vehicle, he must keep all valuable parcels locked in truck or safe furnished for that purpose."

You will please give special attention to rules 610 to 650 inclusive, and see that interested employes are familiar with these instructions and comply with same; and in fact, it is absolutely necessary that you comply with all instructions applying to the care of money and valuables in general.

At points where we are handling currency and coin for banks it is my understanding you have arranged with local police authorities to guard such shipments until delivery is effected. If there is any point where such guard service is not rendered, please advise me immediately.

Kindly acknowledge receipt of these instructions.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 3.)

823 Railway Express Agency
Chicago, Illinois

November 6, 1935.

Bulletin No. 34.
All Agents:

Delivery of In Bond Shipments.

Since the discontinuance of Rule 787 which provided for the handling of certain classes of shipments under signature, there is the possibility of an occasional shipment moving "In Bond" going through to destination office without first having been delivered to the Collector of Customs for clearance.

You should carefuly read Rules 354 to 358, inclusive, of the General Rules and Instructions, and in particular, Rules 357 and 358, the latter dealing with delivery at destination office.

In the event an "In Bond" shipment should reach you without the "In Bond" label having been cancelled or a "Cleared Customs Label," Form 782 affixed, you should withhold delivery until you can ascertain whether shipment has been cleared. Under no circumstances, must delivery be made until such information has been obtained as the Agency is subject to a heavy fine when delivery is made to consignee before shipment is released by the Collector of Customs and all customs duties and charges paid.

Any "In Bond" shipments received without evidence of having been cleared through the Collector of Customs should immediately be called to the attention of Mr. E. S. Buckmaster, General Agent, Chicago, who will arrange for necessary handling.

Game and Fish Laws, Illinois.

The Game and Fish Laws of Illinois have been revised, effective as of July 1, 1935.

Of great importance to express employes is Section 36 of the Game Code, dealing with permits for shipment of Game, which is as follows:

824 Sec. 36. (Permits for Shipment of Game) Permits for the shipment of game to the holder of a hunting license will be issued by the Department, upon the receipt of an executed and sworn application, stating the name of the applicant, his or her age, occupation, place of residence, hunting license number, and that the game to be shipped shall be consigned by and to the applicant at one destination only, and that the same shall not be shipped for commercial purposes.

Any person making false statements in an application for a shipping permit shall be deemed guilty of perjury and punished accordingly.

The holder of such a permit may offer for shipment and have transported, not to exceed three separate shipments of game during the period of time covered by his hunting license. Such shipments shall not be made oftener than once in four days, and no one shipment shall exceed the possession bag limit.

Provided, however, that the holder of such a permit may offer for shipment and have transported not to exceed six separate shipments of water fowl during the period of time covered by his hunting license. Each shipment shall not be made oftener than one in two days, and no one shipment shall contain more than ten ducks, four brants and geese.

Upon offering game for shipment, the permit shall be presented to the agent of the transportation company, who shall endorse in ink thereon the name of the station

from which shipment is made, the destination which much correspond with the address of the holder of the permit stated therein, the date of the shipment, the number of each variety of game contained therein and the agent's signature.

If a permit presented with a consignment of game for shipment shows by endorsements thereon that the number of shipments permitted has already been made thereunder, it shall be unlawful for any transportation company, common carrier or agent or employee thereof to accept the consignment proffered for shipment.

825 Shipments of game birds and animals under such a permit shall be open to inspection and shall have firmly attached thereto a tag upon which shall be stated the name of the consignor (who, under the provisions hereof, is also the consignee), the destination, the number of the permit, the number of the hunting license and the quantity of each variety of game contained in the shipment.

The tag referred to in the above preceding paragraph must be secured by the holder of the hunting license, by making application to the Department of Conservation, and it is our understanding that six tags will be sent him.

Improper Marking of Express Shipments.

Attention has been called to the fact that some shippers are using second-hand cartons on which they are not placing the name and address of consignee, but on the other hand simply writing the same on a piece of cardboard, and placing this cardboard under the string of the package. In the event the cardboard slips out from underneath the string that shipment no doubt would find its way to some former consignee, without the Company being able to determine where it had gone. Furthermore,

such marking would aid a dishonest employee to remove the cardboard and substitute one on which he had written the name and address of some confederate.

Shipments addressed in such manner must be refused.

826 Lost or Stolen Financial Paper—Robbery of American Express Co.'s Collector at Kansas City, Mo., February 2nd, 1935.

In robbery of collector as above described, 360 money orders were taken, as follows:

Z-3331960 to 3332139
Z-8140460 to 8140639

We are advised that some of these money orders are being cashed in and around Tulsa, Okla., regardless of the fact they were advertised as lost or stolen in Financial Bulletin No. 188 dated April 1, 1935.

Please be on the lookout for this paper and notify banks, hotels, merchants and garages and anyone else to whom it might likely be presented. If paper is presented, payment should be refused, paper taken up and if necessary, receipt give for same, except when presented by a bank, then write the words "Payment Stopped" across face of paper and return to bank unpaid. Persons who present such paper should be kept under surveillance, and this office promptly advised by telephone.

I. Longaker,
Supt. of Agencies.

828

EXHIBIT 1-B.

(Part 4.)

Railway Express Agency
(Incorporated)

Chicago, Ill., June 24, 1936.

All Agents:

Handling Freight Values.

Freight Value Rule 787 (new rule 715) Operating Department General Circular No. 18 dated October 1, 1935, reads in part as follows:

> "Receipts will no longer be required for the following classes of shipments, but insofar as it can consistently be done, all such shipments should be given special attention by segregating them from ordinary freight and handling them in messenger cars:
>
> Films, Sound Discs or Talkies
> High Explosives (Samples)
> Liquor
> Shipments In Bond
> X-Ray Tubes
>
> Conditions will not always permit of the handling of these shipments in messenger cars, but wherever possible they should be so loaded."

We have been experiencing substantial increases in claims paid for loss of liquor shipments, and because of delay to shipments of films. With the revision of the freight value rule, it is understood that such shipments as those mentioned were to be given special attention and special handling in order to insure safe handling and to prevent delays.

We do not see why, if these instructions are carried out, there should be any losses or any delays.

It is important that such shipments, as well as all others which formerly were handled under hand-to-hand receipt, be so handled as to avoid losses and delays.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 5.)

829 Railway Express Agency
Incorporated

Chicago, December 17, 1934

All Employes:

Loss and Damage
Delivery of Express Shipments.

Our losses, because of improper deliveries or failure to secure proper signature at time of delivery, are unnecessary. I have just had called to my attention within the past few days several instances where employes in this Division have accepted receipts which consignees deny, and due to inability to produce sufficient evidence that proper delivery has been made it has been necessary to make payment of these claims. In two particular instances, the receipt appearing on delivery sheets does not represent the name of consignee nor can it, in any way, be connected with the firm or person to whom shipment was addressed.

Rule 286 of the General Rules and Instructions reads:—

"The delivery sheet, properly signed, is the company's evidence of contract completed. Entries on the delivery sheet must identify the shipment delivered and the signatures obtained thereon must be that of the consignee or his proper representative."

Rule 306, in part, reads:

> "The law requires at the hands of the carrier absolute certainty that the person to whom the delivery is made is in fact the person to whom the goods have been consigned."

I would suggest that all deliverymen, as well as any other employes who are called upon to make delivery of express shipments carefully read Rules 286 to 358, inclusive, of the General Rules and Instructions that they may be fully informed as to the requirements for making deliveries which, when followed, will eliminate these claims.

While it is necessary these instructions be strictly adhered to at all times, I desire to issue a word of caution that employes exercise great care in making deliveries
830 during the Holiday Season. All will be extremely busy and considerably rushed for time, but we must combine safety with speed and when making deliveries be sure shipments are delivered to consignee as addressed, and that his signature or that of his authorized representative is secured, which must be legible. If someone signs for consignee, that person must be required to also place his name on the delivery sheet, for example: John Jones by William Smith.

In this connection, I wish to remind all employes receipting for shipments of the necessity of comparing marks on the shipments with the information appearing on the receipt in such instances where shipper has prepared the receipt.

There is no excuse for failure to follow instructions appearing in our Book of Rules and we shall insist that all employes must comply with them.

I. Longaker,
Supt. of Agencies.

831 Railway Express Agency
(Incorporated)

Chicago, Ill., Aug. 22nd, 1934.

All Agents:—

Subject: Form 571—Notice of Matter on Hand Where Consignee Is Unknown or Cannot Be Located.

In order to do everything possible in reducing Loss and Damage, we direct your attention to Rule 395 of the Book of Rules and Instructions, which provides that when consignee is unknown or cannot be located, Agent must, within 15 days, issue Form 571. It has been found many Agents are not complying with these instructions. Where there has been any failure on your part to do so, please see that this form is made use of in accordance with the Rule referred to herein.

Subject: Returns On C.O.D. Shipments.

In order to retain our present business and develop all additional traffic possible, it is necessary any complaints received be given necessary attention.

We are particularly interested in complaints filed in connection with our new plan of returning paid C.O.D.'s and whenever you receive any complaint regarding same, I want to be immediately advised with such details as you are able to state and inform me what was the result.

833 Subject: Notifying Shippers Regarding Express Shipments Destroyed in Transit.

From time to time complaints are received from shippers of failure to receive notice of shipment which was destroyed while in transit.

Instructions regarding such notification are contained in Item 4 of Operating Dept. General Circular No. 8, or in

the event you do not have same, they will be found in Rule 1513 in Supplement No. 6 to General Rules and Instructions, as follows:

"Notifying Shippers Regarding Shipments Destroyed in Transit.

1513—Where shipments are destroyed in fires, wrecks or otherwise, and the identity of the shipment or shipper can be determined, the shipper should be promptly informed so that he may adjust the matter with his customer and possibly arrange for duplicate shipment."

In addition, Exception Report, Form 650, should be sent to Agent at point of origin that he can notify shipper.

I. Longaker,
Supt. of Agencies.

• • • • •

EXHIBIT 1-B.

(Part 7.)

835 Railway Express Agency
(Incorporated)

Chicago, Ill., July 31st, 1934.

All Agents:

Subject: Postal Notices to the International Shoe Co. St. Louis, Mo. Covering Undelivered Shipments.

We made mention of above in our Bulletin of July 17th. The International Shoe Co. is not only concerned about the correct point of shipment being shown on notices issued, but they insist such notices be mailed to the branch firm shown as shipper and not to the International Shoe Co., although the latter may appear and usually does appear

on the label. For example, if shipment is forwarded by the Friedman-Shelby Shoe Co. branch, the notice should be mailed to them and not to the International Shoe Co.

* * * * *

836 Subject: Handling of Livestock Shipments.

In the event any difficulty is experienced in handling shipments of livestock due to the fact that the animals become excited and hard to control, notice is to be given transfer point or points and or final destination so arrangements can be made to have an experienced employe on hand to give those animals proper attention.

Subject: C. O. D. Shipments from Chic-Tone Co., Inc. Angola, Ind.—Compliance With Instructions.

The above concern has entered serious complaint because of failure of agents at various points to comply with
837 instructions applied to each and every C. O. D. shipment they make, the instructions reading as follows:

Notice to Destination Office If Refused or Unable to Deliver, Notify Shipper at Once and Do Not Return Until Ninety Days, The Chic-Tone Co., Inc., Angola, Indiana.

Should you handle any shipments from this concern, care should be taken to follow instructions appearing on their labels, referred to above.

Subject: Labels on Shipments of Baggage.

Bitter complaints are received from time to time from shippers of baggage being damaged by express employe placing different kinds of labels on tops, sides or ends of trunks and grips.

Many patrons purchase new trunks, grips, bags or suitcases, some of which are quite expensive, and they strenu-

ously object to our defacing them by impr[illegible]r use of labels. Employes accepting these shipments must thoroughly understand the importance of avoiding the misuse of labels.

Rule No. 48 of General Rules and Instructions reads as follows:

> "Labels on baggage should be placed on the bottom, to avoid defacement; but if tag is tied on baggage, labels other than address labels must be pasted on back of tag with a portion overlapping the face."

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 8.)

839 Railway Express Agency
(Incorporated)

Chicago, Ill., Oct. 3, 1934

All Agents:

Payment of C. O. D.'s and Paid Collections by R. E. A. Treasurer's Drafts.

Although the new method of paying C. O. D.'s and Collections has been in force since July 1st, the Assistant Treasurer continues to render reports of agencies failing to enclose C. O. D. Briefs or submit their Form 94 or 94-S, as the case may be in duplicate.

While Item 4 of the instructions on the remittance section of Forms 94 and 94-S carries information that the "original should be enclosed with the remittance and copy retained at the Agency, the instructions at the top of these Forms carry specific provision that the Form shall be com-

pletely filled out in triplicate. Also General Accounting Department Circular No. 124, dated May 23d, 1934, as well as Treasury Department Circular No. 8, specifically instructs that these forms should be prepared in triplicate and that the original and duplicate should be transmitted to the Assistant Treasurer and the triplicate retained as the agency record.

We want to make it clear that your Forms 94 or 94-S must in all cases be submitted to the Assistant Treasurer in duplicate. If any have misconstrued the instructions and have been following those contained in Item 4 on the remittance section, that should be immediately discontinued. If the failure to enclose your Forms in duplicate has been due to Item 4 please advise me.

The Assistant Treasurer also reports a substantial number of Forms 7175, C. O. D. Brief, are being received without the "Amount to be paid" being filled in. This means that the amounts must be filled in by Clerks in the Assistant Treasurer's office which slows up the issuance of drafts in favor of shippers. Please be sure to always fill in the "Amount to be paid" before the Briefs are sent to the Assistant Treasurer.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 9.)

840 Railway Express Agency
(Incorporated)

Chicago, Ill., Sept. 27, 1934

All Agents:

Subject: New Method of Paying C. O. D.'s.

Information reaches us that some Agents have continued to remit C. O. D.'s by the use of American Express Money Orders. Under no circumstances are American Express Money Orders to be used for remitting C. O. D.'s or Collections.

Subject: Form 571—Notice of Matter on Hand Where Consignee Is Unknown or Cannot Be Located.

Referring to above subject mentioned in Bulletin of August 22d. Please maintain a record of the number of Forms 571 which you send to the Searching Bureau during the month of September, 1934 and March, 1935, and on October 1st and April 1st send me a memorandum showing the number of such forms you issue.

842 Subject: Loss and Damage.

The cold weather will soon be with us. At this time of the year, as a rule, there is a large floating population traveling back to Chicago from the farms and other locations and these men have no visible means of support. It is necessary therefore, that stringent measures be taken to protect the handling of express at your offices as well as on vehicles.

Indications are that this coming winter will see a larger

number of these men than usual who will be out of employment who necessarily will have to live through the winter, and who will of necessity take extreme measures in order to pull through. It is a well known fact that during cold weather crime in general is on the increase, it likewise affects our business and it will, therefore, be necessary that everyone be thoroughly alert to prevent pilfering and stealing of shipments.

We want to avoid any increase in our loss and damage and, in fact, we desire that every effort be made to reduce this unnecessary loss, therefore, all employes must maintain a careful watch over our business.

843 Subject: Payment of COD's and Paid Collections by R. E. A. Treasurers Drafts.

Recently attention was called to the fact that an Agent who under the old system of handling C. O. D.'s was not furnished C. O. D. checks but who remitted in cash, subsequent to July 1st remitted cash to shipper and inadvertently listed the C. O. D. on Form 94 enclosing a C.O.D. Brief as well as forwarded the amount with his remittance to the Assistant Treasurer which brought about the duplicate payment.

Under the new system of handling paid C. O. D.'s it is no longer necessary for Agents not previously supplied with C. O. D. Money Orders to make C. O. D. settlements in cash direct to the shipper. C. O. D. payments from all agency points should be handled through the Assistant Treasurer.

Subject: Return Receipts Requested by Shippers.

Complaint has been received from the Central Life Assurance Society of Des Moines, Ia. that all Agents are not complying with their instructions to furnish them return receipts signed by the consignees, the shipper being willing

to pay the additional classification charge of ten cents on each such shipment. This shipper forwards approximately 50 shipments per month, consisting of abstracts, on which they insist that a duplicate consignee's receipt be attached to each file. This patron forwards shipments to all parts of the United States, and, therefore, all agents when receiving such shipments must comply with Rule 15, Page 23 of Official Express Classification No. 32.

844 Subject: The Best There Is in Transportation—Expedited Service.

If "The Best There Is in Transportation" is to become an axiom, greater attention must be given to improving our service. Numerous reports are being received which reveal that a considerable volume of traffic is delayed.

When shipments are picked up in the early afternoon effort should be made to forward them on first available trains and not wait for the last train serving your office for the day. This will enable them to reach Chicago and other larger cities which may be transfer points in sufficient time to make early evening connections.

Another cause of complaint is the splitting of lot shipments. This should be watched by all offices. Deliveries must be made promptly on arrival. • • • We want to bring about a vast improvement in the handling of express matter.

Agents should prepare Form 1109 covering all misrouted or delayed traffic. • • • These reports should be sent to Mr. J. G. Ruble, General Manager Transportation, Chicago.

Subject: Claim Payments—Cut Flowers and Neon Signs.

For the seven months' period, January to July, 1934, claim payments on cut flowers amounted to $21,094. Much of this loss could have been avoided by more careful handling and affording better protection from freezing.

Shipments of cut flowers either received or forwarded must be properly protected to prevent damage.

There has also been a very heavy loss from the handling of Neon signs which indicates these fragile shipments are being allowed to fall or drop or otherwise roughly handled. Caution all employes to carefully handle this class of traffic to prevent damage.

I. Longaker,
Supt. of Agencies.

EXHIBIT 1-B.

(Part 11.)

849 Railway Express Agency
(Incorporated)

Chicago, April 1, 1937

All Agents:

Loss & Damage Prevention Campaign.

Please refer to my circular letter of March 23, 1937, relative to above campaign effective April 1st, and in which I asked you to prepare and send me, without fail, copy of every exception and inspection reports made at your office.

These reports will be thoroughly analyzed to determine causes for loss and damage, but this cannot be done successfully unless your Form 650 Exception Report and Form 679 Report of Apparent Loss or Damage are complete in every detail. The more you tell us on the reports, the better results we will obtain in the analysis.

Any case of improper packing, marking, billing or handling and any condition arising that tends toward making loss and damage should be reported, for correction of such conditions eliminates possibility of claims arising in the future from those causes.

You should make these reports in every case where proper and do not fail to make them legible and complete in every detail. On your reports rests the Company's chance to locate and correct the cause of claims which are now very much out of line with the business done.

I. Longaker,
Supt. of Agencies.

852 General Instructions.

1. This report is to be prepared in all cases where shipments are found in evident Bad Order.

2. It should be prepared in duplicate and is for information of Railway Express Agency and connecting Express Companies only. It must not be given to consignees or other outside parties. The original must be sent by express mail to destination office, the duplicate forwarded to the Superintendent in whose territory the report is issued.

3. Destination agents receiving these reports must carefully file them for ready reference and when claims are made this report must accompany claim papers sent to Claim Agent for handling.

4. When it becomes necessary to deliver a shipment in evident bad order to consignee, Form 679, "Notice to Consignee of Shipment Delivered in Apparent Bad Order," should be used.

5. Shipments discovered in bad order should at once be rewrapped at the place where the bad order is discovered and this report Form 650 made at that time.

6. At the point where a shipment is discovered in bad order and repairs made, the shipment must be carefully weighed and the weight found, compared with the weight marked on the shipment, if any. A full invoice of contents must be made hereon and this checked against the shipper's invoice if found in package, and a complete statement should be made of discrepancies if any noted.

7. The employe making this report, will make notation on back of the waybill covering the shipment, "Exception Report made by * * *" signing his name and title, route or office and date. This notation should not be placed on the shipment. If there is no waybill, make the notation on a plain shipping tag and attach to shipment. Agent at destination will remove the tag before making delivery. It will not be necessary for other offices to make Form 650 for shipments with this notation.

8. The object of this Exception Report is to place in the hands of Superintendents and Claim Agents, complete information as to the cause and extent of damage to shipments in transit and of errors or negligence. Employes who prepare these forms should bear this in mind and be explicit in the formation they give so that report will prove of value for purpose intended.

The items to be reported should include:

(a) Improper packing. Describe the kind and quality of the container, the nature and extent of interior packing, the quality of paper tape, twine, etc., used and state specifically wherein and how the container failed.

(b) Report valuable shipments which under our rules require special protection which were not being afforded protection of the Money Department or Freight Value Department as the case may be.

EXHIBIT 2-B.

855 Railway Express Agency
Arkansas Division

Little Rock, Arkansas
July 3, 1936.

Circular No.89

All Agents:

Request to Pick Up Merchandise for Return to Spiegel May Stern Company, Chicago, Illinois.

Spiegel May Stern & Company, Chicago, are making very extensive use of our collection service, which consists of requests to pick up merchandise for return to them.

They deliver to us at Chicago approximately 13,000 orders each month, all of which are forwarded to Agents by express mail in accordance with Item N (1) as appearing on Page 3, Supplement 9 to Official Express Classification No. 32.

Since these orders are being handled through express mail instead of waybilled as heretofore, it appears that many Agents are not giving them the attenion called for by the Classification.

They have made a complaint regarding this service, for the reason that a recent check of orders forwarded by them and returned by Agents during a fifteen day period developed that only 45% had been acted upon, by making report with return of the order, or repossessing merchandise for return to them.

It is imperative that Agents conclude their handling of these orders as promptly as possible after receipt, and if the merchandise cannot be repossessed, complete report of the circumstances should be promptly sent to Spiegel May

Stern to enable them to decide what further action they will take.

In order that we may retain this valuable business, you will please see that these orders are given prompt attention and handled in accordance with instructions.

E. E. Honn,
Superintendent.

Route Agents

856

Railway Express Agency
Incorporated
District Accounting Bureau

Los Angeles, May 28, 1935

Subject: Revised Forms
May 1935 Reports

To all Commission Agents:

Under date of April 29, 1935 we sent you among other revised forms for use in preparation of May reports two Forms 96-B—Monthly Balance Sheet Commission Office. This means you use only two blanks monthly of Form 96-B until or unless otherwise advised. The original Balance Sheet you send to this office and you keep a copy. Superintendents I understand no longer want a copy.

In Circular Letter accompanying initial supply of revised forms sent you April 29, 1935 issued by General Auditor Gross Jr. he commented upon changes in the revised forms and you should keep that letter before you when preparing May 1935 reports, and also read printed instructions on different revised forms at times of preparation to insure correctness.

In connection with Collect Statement Form 54 I want to call your particular attention to the lower section thereof.

If you have more than one column of Value and Express Charges be sure you carry different column totals to the space and lines provided at right hand section of form. For example if you have a total in column 1, 2 and 4—1 and 2 is in upper section and 4 lower section Value and Express Charges—such totals should be carried to lines designated Column 1, 2 and 4 at the right, lower section of Form 54. Note particularly that Value and Express Charges, Column 4 Lower Section is the same as Value and Express Charges Column 1, 2 and 3 Upper Section and as such must be carried to the proper lines at the right and included in total. It is very important you be careful in preparation of this section Form 54 and enter figures in proper spaces provided. Also be careful when showing number of waybills in space provided at the bottom of Form 54 and include those listed on the lower section of this form as well as those of the upper section.

On summary section of Monthly Balance Sheet on the back also be careful to show number of revenue waybills in proper column. Likewise the non-revenue and remember such totals should conform to totals shown on B&E Forms 105. Last but not least note especially Paragraph 1 of the printed Instructions at top of Forms 53 and 54 (Statement Forms) about alphabetical forwarding agency arrangement of waybills.

Yours truly,

W. S. McNutt,

District Accountant.

857

Railway Express Agency
Incorporated

Los Angeles Division
Superintendent's Office

Circular No. 121

Los Angeles, Calif.
December 30, 1937

All Agents:

Rough Handling Fragile Instruments Forwarded by Majestic Instruments Company, Chicago, Ill.

Quoted below is letter of General Manager White's letter of December 24th, with respect to rough handling and attendant damage to shipments containing Electro Surgical Instruments and Short Wave Sets, forwarded by the Majestic Surgical Instrument Co., 2608 No. Cicero Avenue, Chicago,—

"This concern ships Electro Surgical Instruments, also Short Wave Units to physicians, surgeons and hospitals throughout the country. Certain apparatus or instruments are enclosed in wood cabinets, which are in turn enclosed in approved cartons well labeled 'Fragile, Delicate Instrument,' also 'This Side Up'. There are also numerous 'Glass' labels on the sides of the cartons.

"They have complained vigorously that particularly during the last three or four months there has been a very noticeable increase in damage to their shipments. Some of the coils have been badly broken in transit. They ship about 25 cabinets a month, as well as other shipments.

"Since the shippers are insistent that we do something to stop this damage, it appears necessary to bring the matter to the attention of all employes throughout the country. We have covered the situation thoroughly in our terminal and vehicle service here."

Will you please watch out for these shipments and see that they are properly handled.

W. W. Argabrite,
Superintendent.

862 Railway Express Agency, Inc.

Office of Superintendent

Central California Division

Circular No. 13

San Francisco, January 28, 1936

All Agents:

Notice of Shipments on Hand.

Considerable trouble is being experienced at San Francisco account failure of agents at some of the smaller points to give proper notice to shippers of shipments which remain undelivered. As a matter of fact, this complaint is not limited to shippers in San Francisco—it crops up from time to time at various points throughout the country, and there is no reasonable excuse.

Some agents get the idea that if they advise consignee verbally that a shipment is on hand, and he promises to take delivery at a later date, no further action is necessary. That is all wrong. Agents should invariably issue postal notices to both shipper and consignee, and retain copies so we will have a record to stand on in the event of complaint at a later date.

See Paragraphs 388, 390, 391, 392, 393, 394 of General Rules and Instructions; also Paragraphs 387, 389 of Supplement No. 5 to General Rules and Instructions.

W. E. Carpenter,
Superintendent.

865 **Railway Express**

Washington, Alaska-Yukon Division

Office of Superintendent

Circular No. 5

Seattle, Jan. 21, 1938

All Agents:

Testing and Care of Scales.

I wish to call to your attention the importance of complying with Rule 1074, General Rules and Instructions, which reads as follows:

> "Testing of scales may be accomplished by using the loose weights accompanying beam scales. The starting test should be made to the capacity of such weights. Then replace the weights with any convenient material of equal weight; again adding the weights to their full extent and repeating the operation alternately to full capacity of scale. Shipments of different weights are usually available for carrying out this test."

Please see that this rule as well as others appearing on Page 71 of General Rules and Instructions are properly complied with.

C. I. Fitzgerald,
Superintendent.

866 Railway Express Agency, Inc.

Northern California, Nevada, Oregon Division—
South Pacific Dept.

Superintendent's Office

No. 54

Sacramento, December 10, 1937

All Agents:

Shipments of Christmas Gift Subscriptions From Coronet, Inc. and Esquire, Inc. 919 N. Michigan Ave., Chicago, Illinois.

Esquire, Inc., publishers of "Esquire" and "Coronet" will forward this year approximately 175,000 shipments of Christmas gift magazines.

In order to reduce to a minimum the number of on hand notices, agents will be governed by the following:

If consignee lives beyond delivery limits, forward by Parcel Post and debit transfer this office.

If unable to locate, give directory service.

If shipment is still undelivered at expiration of free storage period, return.

If not home, deliver to neighbor, janitor, or leave in a safe place, marking on the ticket that it has been left.

If shipment is refused, advise consignee that it is a Christmas gift.

If consignee has moved and new address is known, forward prepaid at registered magazine rate and debit transfer this office.

Shipments returned to Esquire and Coronet should be tied in bundles and one shipment made thereof.

If possible, do not obliterate old marks on returns.

The above instructions cover about everything that could happen to one of their shipments, and, if followed, and no

on hand notices are sent to the shipper, there will be a saving to us in the cost of these notices.

However, they do desire that on hand notices be sent as usual to the consignee.

V. R. Burton,
Superintendent.

867 Railway Express Agency Inc.

Northern California, Nevada, Oregon Division—
South Pacific Dept.
Superintendent's Office

No. 50

Sacramento, December 1, 1937

All Agents and Messengers:

Baggage Shipments.

We repeat rule 91 of General Rules and Instructions:

> "Money, jewelry or other valuables must not be enclosed in trunks, suitcases or packages with ordinary merchandise unless such articles are described in the uniform express receipt issued for the shipment.
>
> "When trunks and other luggage are accepted for shipment, inquiry should be made to find out if they contain any articles of unusual value. If so, such information must be shown in receipt in accordance with this rule, and arrangements made to insure proper protection and handling of the shipment."

Since the discontinuance of sealing baggage shipments, there has been an increase in the number of claims presented covering that class of traffic, and it is not thought at this time that it will be necessary to go back to the former practice of sealing such shipments. It is felt if our Agents and employes would comply with the above quoted

instructions, it would materially reduce our losses in connection with claims presented on baggage shipments, and all are directed to see that these instructions are complied with hereafter.

General Circular No. 4-G, Oklahoma Orchard and Nursery Law.

Superintendent Jones, Oklahoma City, calls our attention to the fact that a great many of our Agents are not complying with the instructions in Oklahoma section of General Circular No. 4-G, in regard to the forwarding of orchard and nursery stock into the State of Oklahoma; such shipments include cut flowers.

It will be necessary that a certificate as required by the Oklahoma State law be attached to all shipments of these articles before acceptance by you for forwarding into the State of Oklahoma.

868 To be of value export declarations must be correct and complete. The description and value of the goods must be in detail and true—no estimated or released values—the actual value of the goods. Instructions on the top, over each heading and on the back of the declaration form should be read and followed in detail.

The Export Division of the U. S. Customs at San Francisco are hereafter going to comply strictly with the regulations and will refuse to pass declarations which are improperly or incompletely filled out. For the information of our agents, following are some pointers which should be checked carefully when declarations are accepted from shippers:

Must be prepared in ink or typewriter—pencil is not acceptable.

Description must be complete—each individual kind and quantity of material must be stated separately with a value

of each. For example—a shipment of 20 dresses should read somewhat as follows:

12 mixed cotton and wool dresses	Val.	$72.00
8 rayon dresses	Val.	32.00

The quantity should be stated in units of measurement of the particular commodity shipped such as, pounds, square yards, dozen, gallons, feet, etc.

Use one space for each item in the description column.

Instructions in Paragraph 2B (back of Form) require that declarations for shipments valued at $100.00 or over be notarized or verified by oath before a Customs Official.

All Agents will be guided by these instructions at all times.

V. R. Burton,
Superintendent.

869 Railway Express Agency Inc.

Northern California Nevada Oregon Division—
South Pacific Dept.

Superintendent's Office.

No. 53.

Sacramento, December 10, 1937

All Agents and Messengers:

Printed Matter to Sales Bureaus
With Charges Collect.

We are advised there is an unnecessary amount of detail work in the Sales Bureaus growing out of our efforts to collect from shippers unrealized charges on shipments of advertising matter, printed matter, etc.

Attention of all Agents is directed to Rule 338 of our General Rules and Instructions, as such advertising matter,

printed matter, etc., if sent collect, charges must be guaranteed by the shipper. If the rule were followed there would be no occasion for sending such shipments to the Sales Bureaus with charges to collect.

We must insist that hereafter all Agents comply with the instructions in this rule, and after notice is mailed if no disposition is given by shippers you must debit transfer the forwarding office for amount of charges within thirty days of the postal notices to shippers.

Change in General Circular No. 7-D
Live Stock, Live Animals and Bees.

Having reference to Tennessee section of General Circular 7-D:

These regulations provide that all dogs imported into the State of Tennessee, except performing dogs, must be accompanied by a health certificate certifying that rabies has not existed for at least three months within a radius of 25 miles of the origin of the shipment. Agents, before accepting shipments of dogs destined to Tennessee, will see that the Tennessee regulations are fully complied with before being forwarded.

V. R. Burton,
Superintendent.

EXHIBIT 17B

1101 Railway Express Agency.
(Incorporated)

Chicago, Ill., April 10, 1936.

Bulletin No. 47.

All Agents:

1103 Paid C.O.D.'s and Collections.

Recently, we have noticed Assistant Treasurer Van Loan has been obliged to return to Agents in this Division, C.O.D.'s on which shippers instructed signed contracts, notes, mortgages, etc. be accepted.

Such C.O.D.'s consisting of signed contracts or other papers, must not be remitted to the Assistant Treasurer.

Please refer to General Accounting Department Circular No. 124 dated May 23, 1934, second page, paragraph 3(b) which reads in part as follows:

> "When documents are to be returned to shipper the cash collected should be enclosed with collection brief and documents in money envelope (Form 6034) and sent forward to shipper under money waybill."

Shipments Handled in Air Express Service.

Paragraph (b) Item 3, Page 2 of General Accounting Department Circular 119-B dated February 1, 1936, reads as follows:

> "(b) The time of acceptance should be shown on all receipts issued for air shipments."

Also Paragraph 2, Section 2 of General Accounting Department Circular 123-B dated February 1, 1936, reads:

> "The destination agent should enter on the waybill and delivery sheet the time the shipment was receipted

for, if not already entered thereon by the forwarding office, the time it was delivered to the consignee, and the time it would have been delivered if it had been handled entirely in rail express service."

Please see that the above instructions are complied with.

1105 Liquid Waybill Glue.

In the past, waybill glue has been furnished in one-half gallon or larger containers.

In order to avoid wastage, it has been arranged to furnish waybill glue in smaller containers, ranging from one pint upward.

Please confine your orders to quantities commensurate with your requirements.

Envelopes for Continuous Use.

Since June, 1933, the Company has been furnishing envelopes so designed as to permit of their use over and over again. This was first referred to in Operating Department General Circular No. 13, August 15, 1933, and is covered also by Paragraph 1119 of the January 1, 1936, issue of General Rules and Instructions.

It is very apparent that judging from the consumption of single-use enevelopes, forms 6002, 6061, and 6079, that the repeat envelopes are not being used as much as they should.

Furthermore, surplus returned to the Supply Depots indicate that two or three spaces are being used for one address and that the re-use envelopes are not being written up as indicated by the instructions appearing thereon.

These continuous envelopes must be used for company mail, reports, etc. when it is not absolutely necessary that a sealed envelope be used for communications of a confidential nature.

I. Longaker,

Supt. of Agencies.

PETITIONER'S EXCEPTIONS TO EXAMINER'S SECOND REPORT.

1263 25. To that part of the Examiner's report wherein on page 33 he states that the merchant agent, like the joint agent, is bound to comply with the rules and regulations of the Express Agency.

As we have stated previously, the joint and merchant agents are bound to comply with only those rules and regulations which apply to them.

ORAL ARGUMENT BEFORE THE RAILROAD RETIREMENT BOARD.

(June 9, 1939.)

[The following excerpts refer to the Railway Express Agency's Application For Employment (Form 100) which was Exhibit 11 in the first hearing.]

1291 The Chairman: This one application which is given on pages 7 and 8 of the Examiners first report, that is the single application which is signed by joint agents as well as exclusive employees.

Mr. Hartung: Yes.

The Chairman: Since you do have an employer-employee relation with your exclusive employees and since the application form, in specifying the details and manner of service unquestionably applies to your exclusive employees, is there any reason for saying that the specifications in this form as to the details and manner of service do not apply to these other men who are joint agents? Is
1292 there anything in the record which would justify a different interpretation of the same application form as it applies to these men who are joint agents?

Mr. Hartung: These men are not employees. We might

not direct the independent contractors as to the manner of the work.

The Chairman: But both signed this same form. What is the difference? What happens in the case of each class of men?

Mr. Hartung: By the signing of the application form a man in one instance becomes an employee and in the other he becomes an independent contractor. The employee becomes bound by the rules of the company as to seniority rights and all other matters that affect an employee when he enters the service.

1295 The Chairman: This agreement says that he is going to conduct this business in accordance with the regulations of the company.

Mr. Hartung: So far as they apply, he is bound.

The Chairman: How does he know that the regulations do not apply to him, or which do and which do not? How does he distinguish between them?

Mr. Hartung: By practice and by understanding. That is the general practice. It is also true that by reason of the character of the instructions the agent knows whether he is bound by them or not, whether they are instructions that relate to the things he must do as an independent contractor or as an employee.

PETITIONER'S REFUND CLAIM NO. 1.

(November 20, 1943.)

1335 Statement on behalf of Railway Express Agency, Incorporated, Employer No. 6202, in support of its Claim No. 1, dated November ....., 1943, for Refund of Contributions.

Pursuant to suggestion made by the Railroad Retirement Board, the individuals here involved, for Railroad Retirement Board purposes, have been classified as follows:

"Contract" Occupational Classification	Occupational Group
391	Agents
392	Office attendants
393	Warehouse and platform form laborers
394	Vehicle employes
395	All others

For the purposes of this application, it is necessary to make a reclassification as follows:

1. Merchant Agents and their assistants
2. Joint Railroad-Express Agents and their assistants
3. Branch Agents
4. All others

1336 Statement.

Railway Express Agency, Incorporated, is a Delaware corporation engaged in the transportation of property by express, intrastate and interstate throughout the United States, in Canada, Cuba, Alaska and Hawaii, and

as such is subject to the provisions of the Railroad Unemployment Insurance Act, the Carriers' Taxing Act of 1937, the Railroad Retirement Acts of 1935 and 1937, the Railway Labor Act, and the Interstate Commerce Act, and various regulatory laws of the United States and of the several states.

Railway Express Agency conducts express operations by rail, water, motor vehicle, and air. It began operations on March 1, 1929, succeeding the American Railway Express Company which had conducted the express transportation business since July 1, 1918, when it succeeded the Adams Express Company, the American Express Company, the Southern Express Company and Wells Fargo & Company, the principal express companies in the United States operating at that time. Railway Express Agency operates over all the railroads in the United States (it began operating over the lines of the Southern Railway Company and its affiliates in 1938) by virtue of a contract uniform as to terms and generally known and described as the Express Operations Agreement (copy annexed and marked Exhibit "1").

The Express Agency maintains approximately 22,000 offices throughout the United States. At more than 16,000 of those offices, the amount of business transacted is exceedingly small and the income derived therefrom does not warrant the employment of regular employes. 1337 At such offices, therefore, arrangements have been made to have the Express Agency represented by an individual in the service of a railroad, or by an individual in business for himself or otherwise engaged, or by a company. This situation always has existed in the express business. It was essential to make some arrangement for the handling of the few shipments at the smaller communities, in order adequately to serve the public.

At the larger places where the volume of business is

substantial, the Express Agency has its own offices, facilities, equipment and personnel and employs large numbers of persons to conduct its operations at such points; but in the smaller communities where the business is limited to but very few shipments a day, it is not practicable or in the interest of good business to engage even one employe for the handling of that business. Consequently arrangements were made with individuals or companies who could handle the small valume of express business transacted in their communities as an incident to their regular business or occupation. This was done generally on a commission basis, *i.e.*, by the payment of a percentage, most frequently 10 per cent, of the express charges on the shipments handled by them.

1340 The Merchant Agent and His Assistants.

In order to afford a comprehensive express service throughout the United States, express companies found it necessary to establish agencies in small communities where the express business handled was negligible, in some cases amounting only to one or two shipments a day and sometimes even less. Obviously it was impracticable and in fact economically impossible to have service at these small places performed by regular employes of Railway Express Agency, Incorporated. Accordingly, where possible, arrangements were made with agents of railroads to handle the Express Agency's business. Such agents are known as joint railroad-express agents. However, in cases where it was impossible or impracticable to engage the services of the railroad agent, either because of his refusal to be bothered, the lack of a railroad agent in the community, or for any one of several other reasons, arrangements were made to have a merchant or a company or an individual mainly engaged in some other acdivity to represent the

express company. Such agents are known as merchant agents.

A survey of the smaller agencies was made in 1341 March 1937, and at that time it was found that 1,469 agencies of the Express Agency were handled by the so-called merchant agent. Of these 1,469 agents, 734 were merchants or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters or postmistresses, 117 were in the trucking, drayage, bus or taxi business, 62 operated automobile agencies, service stations, garages and repair shops, and 12 were companies engaged in trucking, drayage, bus or taxi business. A number were engaged in occupations such as clerks, packing concern employe, coal company employe, insurance salesman, student, mail carrier, undertaker, painter, blacksmith and priest.

The merchant agent conducts the business of the express company in his community in his place of business. The express company generally furnishes him with counter scales and whenever the express business is so heavy as to require the use of the same, with four-wheel platform trucks. In order to comply with the laws regulating its business, it is necessary that the forms used in the conduct thereof be uniform and that the service rendered and the charges made therefor be uniformly applied to all patrons having occasion to use its service. (Interstate Commerce Act, Title 49 U. S. C., particularly Section 10). Accordingly, the express company necessarily furnishes each merchant agent, as well as every other agent receipting for and delivering express shipments, with a set of tariffs, forms for the receipt of express shipments, receipt of transportation charges, the delivery of shipments, waybill forms, abstract and prepaid shipments' forms, forms for statement of receipted collect business, and all other necessary forms. For the same reason the express company also furnishes each merchant agent with a copy of its

General Rules and Instructions and with any amendments thereto which specify the requirements which must be complied with by all agents in order that the express business shall be conducted lawfully and to the best interest of its patrons.

The Express Agency may not direct the merchant agent at any time as to where in his place of business the counter scales are to be kept, or where in his place of business the Express Agency's office is to be maintained, or that he shall serve the Express Agency's patrons before serving his own, or that he shall personally attend all of the Express Agency's business. Such agent may and frequently does have the Express Agency s business attended to from time to time by one or more of his clerks, as well as by himself without segregating the time spent in express service from the time spent in the regular business of the agent.

1342 The Express Agency has no power to punish the merchant agent for dereliction of duty, nor can the Agency sever the relationship with the merchant agent without losing the benefit of the use of the agent's premises upon which its business is being conducted.

The merchant agents are paid on a commission basis, generally about 10 per cent which covers not only their services but also the services of their assistants, the use of their premises and telephone and all expenses pertaining to their agency except for the cost of materials furnished by the Express Agency as above set forth.

The relationship of the merchant agent to the Express Agency as it existed during the period involved, and as it still exists, was the same long before it became necessary for the Express Agency to consider its effect in the light of the definition of employer and employe in the Railroad Unemployment Insurance Act. The Express Agency and its predecessors never did consider the merchant agent and his assistants as employes. The Agency never exercised any jurisdiction over them with respect to hours of labor,

working conditions, promotion and demotion. The pension plans of the Agency and its predecessors did not apply to such agents. Increases and decreases in wages have not been extended to them. Vacation plans of Railway Express Agency and its predecessors never have been extended to them. They are not entitled to free transportation on the railroads as are employes. They have never been included in the payrolls of the Express Agency and its predecessors, and they have never been reported as employes to the Interstate Commerce Commission as required of the Express Agency for all employes.

In these circumstances, the Express Agency does not have the continuous right to control the manner of the rendition of the merchant agent's services and certainly not the right to control the manner of the rendition of the services of the merchant agent's assistants and, therefore, the relationship is not that of employe-employer within the meaning of the Act.

The Joint Railroad-Express Agents and Their Assistants.

At over 14,000 of the small communities in the United States, Railway Express Agency, Incorporated, is represented by the joint railroad-express agent. This individual is primarily employed by a railroad to act as its agent. His duties to the Express Agency are secondary to those 1343 he owes the railroad. By reason of his employment with the railroad, the Express Agency obtains the benefit of the use of the railroad premises. The Express Agency itself lacks the power to discipline or discharge the agent. It may sever the relation, but by doing so it loses the benefit of the use of the premises upon which the agent works. By reason thereof, it lacks the right to control the manner of the rendition of the agent's work necessary to bring him within the definition of "employe" in the Railroad Unemployment Insurance Act.

The joint agent, like the merchant agent, may, and at times does, employ others to assist him in the conduct of his express business. Frequently he sells insurance policies for insurance companies, handles telegrams for the telegraph company, and performs other services as a general agent in his community. From the services, some of which are performed by individuals whom he employes, he obtains a profit.

Generally he is paid on a commission basis, although in some few instances he receives a stated sum which has been termed in express terminology a "fixed allowance." From these payments which he receives he conducts his agency, paying for all costs including the hire of additional help which he may find necessary, except the cost of things which are furnished him by the Express Agency which are tariffs and current amendments thereto, a copy of the General Rules and Instructions of Railway Express Agency, Incorporated, and current amendments which furnish the specifications of his work, all forms necessary for the conduct of the business, counter scales, and in those cases where warranted by the amount of business, four-wheel platform trucks.

The joint agent has never been considered an employe by the Express Agency and its predecessors. He has not been reported to the Interstate Commerce Commission as an employe as required of the Express Agency with respect to its employes. The pension plans of the Express Agency and its predecessors never did apply to such agents. Increases and decreases of wages have not been extended to them. They have never benefited from the vacation plans of the Express Agency or its predecessors. They are not subject to promotion or demotion in the Express Agency's service. They are not subject to that control required by the Act to constitute them employes.

THE THIRD HEARING.

(Session of August 10-12, 1948.)

1371 Appearances:

Fulmer Long, 547 West Jackson Boulevard, Chicago, Illinois, Attorney, Railway Express Agency, Inc.

Leo J. Hassenauer, 105 West Adams, Chicago, Illinois, Counsel for The Order of Railroad Telegraphers.

Everett L. Gordon, Associate to Mr. Hassenauer.

H. C. Kearby, Vice-President, The Order of Railroad Telegraphers.

Robert Morgan, Brotherhood Building, Cincinnati, Ohio, Vice-President, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

James L. Crawford, Brotherhood Building, Cincinnati, Ohio, General Counsel for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

W. M. Daughtrey, Assistant to Vice-President, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

A. H. Burns, Sparta, Illinois, Merchant Agent, Railway Express Agency.

C. C. Harrison, Rockville, Indiana, Merchant Agent, Railway Expres Agency.

* * * * *

1378 Examiner Funk: As you will note, this proceeding is, in part, a reopening of Jurisdictional Docket No. 2. Consequently, the record in that Jurisdictional Docket is before the Examiner in this proceeding, and exhibits intro-

duced at the previous hearing will, of course, not have
1379 to be reintroduced. The proceeding has been designated as R. R. B. Jurisdictional Docket No. 2-2A.

* * * * *

1381 Examiner Funk: Mr. Long, would you like to make an opening statement on behalf of the Railway Express Agency?

Mr. Long: Yes, I would, Mr. Examiner.

Railway Express Agency, Incorporated, hereinafter referred to as Railway Express, proposes to show as follows. Railway Express has approximately 22,000 agencies throughout the United States, in Canada, Cuba, Hawaii and Alaska. At each of these agencies, Railway Express is represented by an agent who falls within one of the following classifications: salaried agent, exclusive commission agent, joint railroad-express agent, merchant agent and branch agent. The salaried agent and the exclusive commission agent have always been considered and treated as employees; the joint agent, the merchant agent and the branch agent have always been considered by Railway Express as not employees.

* * * * *

1382 Joint agents are employed full time by a railroad as agent and while so employed also represent Railway Express as agent. They include all individuals within the scope rule of any agreements between Railway Express and the Order of Railroad Telegraphers.

Railway Express proposes to show that merchant
1383 agents, their assistants, helpers and employees, and that branch agents, their assistants, helpers and employees (who are not full time employees of a railroad) as hereinafter defined are not its employees within the meaning of the Railroad Retirement Act and the Acts related thereto, particularly the Railroad Unemployment Insurance Act.

* * * * *

1383 * * * Generally merchant agents are paid a commission, usually 10% of the express charges on shipments handled by them. However, in some instances they are paid a contract sum per month—I might say in some few instances there—or a commission plus a stated sum per month. These payments cover the work performed by the agent and his helpers, assistant and employees, the use of the premises where the agency is operated, and all facilities generally used in the operation of the agency such as telephone, electric light, and tools and materials used, except the necessary forms for the conduct of the express busi-
1384 ness, some stationery supplies, a complete set of tariffs, Railway Express Agency's General Rules and Instructions setting forth the specifications for the conduct of the business, usually a counter scale, and in some instances a platform truck or a safe or both. The General Rules and Instructions include rules which apply to the conduct of employees and to the manner in which they shall conduct their work for Railway Express, but only those rules which are in the nature of specifications as to results apply to the merchant agents. At times letters and bulletins are addressed to all agents including merchant agents directing their attention to specifications which should be followed in order that results required be obtained.

All individuals representing Railway Express as employees or independent contractors such as merchant agents are required and always have been required to fill out a form having Railway Express number 100, entitled "Application for Employment." Prior to 1945 this form included an application for a fidelity bond. The "Application for Fidelity Bond" part of Form 100 bound the merchant agent to see that the express work at his agency was performed in accordance with the specifications in the rules and regulations of Railway Express. No helper, assistant or employee of a merchant agent ever was or is required

to fill out or sign Form 100. During 1945 the "Application for Fidelity Bond" was eliminated from Form 100, and is not required any more from employee or independent contractor.

Railway Express necessarily uses thousands of different forms in the conduct of its business, and from a practicable and economical point of view it is necessary to keep the number of such forms to a minimum. Accordingly, it was found inadvisable to add an additional form for use only with respect to independent contractors.

In minimizing the number of forms Railway Express uses a single form, that is Form 95, for the transfer of accounts at each commission agency from one agent to another, whether the agency be operated by a joint agent, exclusive commission agent, or merchant agent.

• • • • •

1386 A branch agent generally is an individual but may be a corporation or a partnership, and frequently is a hotel. Like the merchant agent, he is generally engaged in some other business and operates his branch agency as a side line. His private business is located within the pickup and delivery limits of a regular salaried agent. He receives calls usually by telephone requesting that a driver of Railway Express pick up a shipment and he transmits these calls to either a truck driver of Railway Express or to the salaried agent. He permits undelivered shipments to be held on his premises for call by the consignee and he receives shipments for holding at his office and eventual
1387 pickup by the express driver.

All the express work which the branch agent does is performed upon his premises, and if the relationship is severed, Railway Express loses the benefit of the use of such premises.

A branch agent generally is paid in accordance with the

number of calls he receives or the number of shipments which are received or delivered at his premises.

Generally a branch agent is furnished only with forms of express receipts but a few branch agents are furnished, usually at their request, with a copy of the General Rules and Instructions and a copy of the applicable tariffs. I might add there that most all of them do have the applicable tariffs but very few have a copy of the General Rules and Instructions, and those who have obtained it because they requested it.

The branch agent is not required to make out monthly reports or statements as is the merchant agent, and only a few letters and bulletins are addressed to him as to the specifications of his work.

* * * * *

1388 Now I might add this, at this point. There have been prepared by the Accounting Department of Railway Express exhibits from information received from the Operating Superintendents showing all individuals who were considered merchant agents representing Railway Express between and including January 1, 1937 and December 31, 1945. These exhibits also purport to show the helpers, assistants and employees of such agents who received any compensation from express work. Recently my attention was directed to some agencies in these exhibits and a check has shown that some individuals are listed therein who perhaps should be considered as joint railroad-express employees.

Railway Express is a consolidation of a number of express companies such as the Adams, Wells Fargo, American, United States and others, each of which had in use nomenclature peculiar to itself and now having various shades of meaning in the express business. Joint railroad-express agencies are often changed to merchant agencies when the railroad agent will not or cannot any longer

handle our business; and merchant agencies are often changed to joint agencies when the railroad agent evidences a willingness to handle the express business. These factors possibly have caused some confusion among the superintendents as to some few cases.

In any event, when a clear definition of merchant agent is established at the hearing, Railway Express should like an opportunity to check these exhibits for the purpose of eliminating those agencies which do not fall within that definition.

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1390 Examiner Funk: Mr. Long, in your statement with regard to the joint agents, do you also include your assistants to joint agents?

Mr. Long: Yes, we do. We state that for the record.

Examiner Funk: You admit both of them to be employees for this proceeding?

Mr. Long: The joint agents and their assistants, employees and helpers who are credited with any compensation from express service are employees of Railway Express Agency.

Examiner Funk: For the purpose of the record, do you intend to define assistants to joint agents?

Mr. Long: I shall, if you desire. I haven't considered that. We might define assistants, helpers and employees of joint agents as all those individuals who are reported to Railway Express Agency, Incorporated by said joint agent as his helpers, assistants and employees on Railway Express Agency Form 7051.

Examiner Funk: Do you intend to introduce a copy of that form?

1391 Mr. Long: Yes, we shall.

Examiner Funk: You may proceed.

(To Mr. Hassenauer.) Do you wish to make any statement at this time, or do you wish the Express Agency to go ahead and present their evidence?

Mr. Hassenauer: I would like to make a brief statement, if the Examiner please.

The Order of Railroad Telegraphers in this case represents all joint railroad-express agents coming within the scope of the collective bargaining agreements effective between the Order of Railroad Telegraphers and all railroads throughout the United States subject to the Railway Labor Act, the Railroad Retirement Act and the Unemployment Insurance Act, and all those joint railroad-express agents who come within the scope of the collective bargaining agreements referred to by Mr. Long which the Railway Express Agency, Incorporated has promulgated with the Order of Railroad Telegraphers in the Southeastern Territory. The Order of Railroad Telegraphers has represented the joint railroad-express agents in the hearings before this Board, more particularly in Jurisdictional Docket No. 2, referred to by the Examiner and by Mr. Long, and the contentions that were made in those proceedings on behalf of the Order of Railroad Telegraphers were sustained by this Board holding that joint railroad-express agents are employees of Railway Express Agency, Incorporated within the purview of the Railroad Retirement Acts of 1935 and 1937. The ruling of the Examiner in those proceedings was confirmed by this Board in its Opinion of August 1, 1939, referred to by the Examiner in his opening statement. Since the Opinion of August 1, 1939 by this Board, adopting the findings of fact and conclusions of law of the Examiner in Jurisdictional Docket No. 2, the Order of Railroad Telegraphers has entered into collective bargaining agreements with approximately 19 railroads in the Southeastern Territory, with the Railway Express Agency, concerning rates of commission and certain work-

ing conditions of these joint railroad-express agents
1392 while they are employed by Railway Express Agency in the performance of express work. These agreements have been filed by Railway Express Agency, Incorporated with the National Mediation Board in conformity with the mandatory provisions of Section 5(e) of the Railway Labor Act. The various Boards created under the Railway Labor Act, the National Railroad Adjustment Board and the National Mediation Board, have likewise rendered Opinions holding that joint railroad-express agents are employees of Railway Express Agency, Incorporated. They held that they are primarily employed by the railroad and secondarily by Railway Express Agency, Incorporated.

The Supreme Court to the United States has held, in 321 U. S. Court 342, that where an agreement has been effected between an express agency concerning commissions to be paid to joint railroad-express agents, no change could be made in that agreement unless the express agency taking over that agreement had entered into negotiations with the duly authorized representatives of such employees. In that case, Mr. Justice Jackson—I will refer briefly to his statement made in that Opinion, which I think may be of some assistance to the Board in this case—Mr. Justice Jackson in that case said: "Employees here involved were agents at stations on the Seaboard Air Line Railroad who primarily are employees of the railway and secondarily of Railway Express Agency. They receive compensation from each employer."

In view of the contentions which have been made here by Railway Express Agency on the record, it appears that the Order of Railroad Telegraphers here is in the capacity of trying to be of assistance to this Board in whatever character it can in this hearing. Whether we will introduce any testimony will depend upon the testimony

to be introduced in this case by Railway Express Agency and by any of the other parties either in a representative or individual capacity.

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1396 Mr. Burns: Well, I have been an agent at Sparta, Illinois since 1914, and in 1918, when I had typhoid fever, I was relieved by an agent of the Express Company at that time, not by someone that worked with me, like he stated. I have continued as agent during all those years, and the Board ruled before that we were covered by the Act, and I feel that if I spent 34 years and have been directed by them and made my reports to them, that I should be classed as covered by the Act.

Examiner Funk: Well, then, Mr. Burns, you intend to testify a little later with regard to your work as merchant agent?

Mr. Burns: That's right.

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1597 Examiner Funk: I have before me a letter written by Mr. W. A. Benson, vice-president of your organization, with the initial "J" beside the title.

Mr. Long: I believe that is Mr. Jump. He is assistant to the vice-president in New York.

Examiner Funk: This letter is dated January 29, 1942, in which he makes a statement of the designation of what a branch agent is. I would like to read that to you and ask you if that is still the opinion of the Express Agency. The letter is addressed to Mr. Lester P. Schoene, General Counsel, Railroad Retirement Board, and has reference to the case of one Mr. E. C. Hargraves, the branch agent at Merrimac, Massachusetts.

Mr. Morgan: Is that part of the previous case?

Examiner Funk: We have it here in our files. It is one of the letters upon which L-42-298 was based, which Opin-

ion you referred to in your opening statements, to which you have referred in the demand for refund.

Mr. Long: That is correct.

Examiner Funk: Mr. Hargraves is one of the individuals mentioned in that Opinion.

Mr. Long: Yes. I recall. That is true. Could 1598 I read that letter? I don't remember it.

(The following paragraph was read by Mr. Long from the letter referred to by Examiner Funk.)

> "The designation 'branch agent' is used in express operations to differentiate between a 'merchant agent' who is the official representative of Railway Express Agency, Inc., in his community and a 'branch-package receiving agent' who conducts an independent trade or business of his own and on the side receives calls for the driver of Railway Express Agency, Inc., to pick up express shipments and accepts shipments from patrons in the locality of his place of business for transportation by Railway Express Agency, Inc."

Examiner Funk: That is the paragraph I had particular reference to.

Mr. Long: Yes. I would say that is descriptive of the branch agent, but there are a few cases where the branch agent has also received shipments from the driver who has been unable to effect delivery of them and who has held such shipments at his place of business for call by such consignee. That, however, is the exception, and there are very, very few of those. In fact, I don't know of any particular instance at this time, but I am told there are a very few.

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Session of March 14-16, 1949.

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1704 Examiner Funk: Mr. Long, on behalf of the Railway Express Agency, do you have anything to say about your various classes of agents at this time?

Mr. Long: Yes, I do. We have modified our definition of merchant agents, and I have prepared a statement that I would like to read with respect to that modified definition.

To make it possible for our operating people to 1705 easily identify the merchant agent and properly classify him we have decided to narrow or confine somewhat our definition of merchant agent as appearing on pages 9 to 12, inclusive, of the transcript of the hearing held August 10 through August 12, 1948, and in accordance with the narrowed or confined definition of merchant agent, we have eliminated from our exhibits what might be considered as borderline cases. We except from the merchant agent class all of those agents who do not themselves control, either by ownership or by lease, the premises upon which their express office is located. Accordingly, item B on page 11 of the record of the hearing beginning August 10, 1948 is to be eliminated, and item A restated as follows: 'A housewife who has her express office in her own home."

Under this narowed definition of merchant agent, there will be eliminated from our claim all so-called caretaker agents and custodian agents and such agents as C. C. Harrison of Rockville, Indiana, who testified at the August 10, 1948 hearing, and Roscoe Wilson, Chenoa, Illinois, and Wilma Mehl at Mt. Sterling, Illinois, concerning who Mr. Lace testified. The testimony appears on pages 259 to 262, inclusive, of the hearing beginning August 10, 1948. The terms caretaker agent and custodian agent

have been used to describe the same kind of class of agent—that is, an individual who acts as caretaker or custodian of the railroad station where the sale of passenger tickets has been discontinued and freight service is limited to inbound prepaid shipments, and who operates his express office in the station, usually on a commission basis, although there are a few who are paid a fixed allowance per month and who at times may have been referred to by our officials as contract agents.

I might add that the term contract agent generally in the express business refers to an agent who is paid a stated sum per month for the conduct of the entire agency, and who has been considered in the same light as an exclusive commission agent. However, in some cases our people have loosely referred to contract agent as applying to any agent wheo may be paid a stated allowance per month and who in fact may be a merchant
1706 agent, a branch agent, a custodian agent a caretaker agent, an exclusive commission agent. In other words, the mere fact that an individual is paid a stated allowance per month does not truly identify him, although that characteristic has been used by some of our people as identifying the man wrongly as a contract agent.

Examiner Funk: Well, Mr. Long, in the Examiner's report on the first hearing, Examiner Schoene, at page 3 of that report, stated: "Individuals rendering service for the Express Agency may, for the purpose of this report, be divided into the following six groups." He lists six groups there, Mr. Long, and I am wondering if at this time you can now state to us on the record the various groups into which all express agents may be divided.

[Mr. Long's statement of definitions of the various classes of agents is printed in Petitioner's appendix, pages 443-7.]

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1710 Examiner Funk: Mr. Morgan, you said you have some questions?

Mr. Morgan: Yes, for the purpose of clarification, and if Mr. Long doesn't mind. Now, these six characterizations that are shown in the Examiner's findings of the hearing back in December 1937, I believe—was it your intention, Mr. Long, to take issue with those different characterizations as they are set down in that hearing, or merely to amplify each? I wonder if you would mind explaining that, at least for our side of the house, as well as to also satisfy the record for the benefit of the 1711 Board. Putting it differently, do you take issue with those characterizations, or do you agree that they were properly set down and you are only undertaking in the record here today to amplify those characterizations? That is the point I want to get clear.

Mr. Long: My purpose here is to amplify those categories, and that, I believe, is what we have done.

* * * * *

1713 Examiner Funk: The Examiner wishes to make one statement with regard to pickup and delivery, referred to by Mr. Long. Whenever the pickup and delivery work is performed by the joint agent, the merchant agent, or the branch agent, as heretofore defined by Mr. Long, the agent's status with respect to his pickup and delivery work is before the Examiner. Where the pickup and delivery work is performed by someone who is otherwise in some other capacity employed by the Express Agency, and in his other capacity is covered by this hearing, his status with respect to the pickup and delivery work is before the Examiner. However, in cases 1714 where the pickup and delivery work is performed by someone under a contract with the agent and the work is performed in the individual's own truck, and he performs no other work of any nature which could be

considered employee service for the Express Agency, his status is not before the Examiner.

(Remarks off the record, at the request of Mr. Hassenauer.)

Mr. Morgan: Mr. Examiner, I cannot say, without having an opportunity to analyze your statement, whether or not we have a clear understanding of the issue before the Board.

(Remarks off the record, at the request of Mr. Morgan.)

Examiner Funk: Do you wish to make any further statement?

Mr. Morgan: I think not, Mr. Examiner. I understand your position exactly.

Examiner Funk: The Examiner having explained to Mr. Morgan that he is making no determination with regard to the employee status of the individuals who in their own truck perform pickup and delivery work under a contract with the joint agent, and who perform no other work which might be considered as employee service for the Express Agency, Mr. Morgan then stated that he agreed.

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1738 Examiner Funk: Mr. Long, for the purpose of the
1739 record, category No. 1: Do you admit these individuals are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: We do.

Examiner Funk: Category No. 2: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: We do.

Examiner Funk: Category No. 3: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this proceeding, we do.

Examiner Funk: What do you mean "for the purpose of this proceeding?"

Mr. Long: I mean that we are waiving our claim, and that for the purpose of this hearing we concede that they are employees. With respect to some other law or some other situation, they might not be considered as employees, but with respect to this proceeding, which I understand will develop a ruling as to whether they are or are not employees under the Railroad Retirement Act and the Carriers' Taxing Act—

Examiner Funk: We are not ruling under the Carriers' Taxing Act.

Mr. Long: Just the Railroad Retirement Act and the Railroad Unemployment Insurance Act—that they are employees.

Mr. Morgan: Mr. Examiner, as I understand Mr. Morgan's answer, he unequivocally admits that they are, for the purpose of these proceedings.

Examiner Funk: For the purpose of these proceedings.—How do you designate this category No. 3? What do you call these individuals?

Mr. Long: Joint employees.

Examiner Funk: With respect to category No. 4, 1740 do you admit that the individuals described herein are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this proceeding, we concede that they are employees.

Examiner Funk: Category No. 5: Do you admit that these individuals described herein are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this proceeding, we concede that they are employees.

Examiner Funk: Within the meaning of both Acts.

Mr. Long: Within the meaning of both Acts.

Examiner Funk: Well, Mr. Long, I note that in category No. 5, and also in category No. 9, you refer to custodian and caretaker agents.

Mr. Long: Yes, I do. I do that because some express people have referred to some custodian or caretaker agents as merchant agents when they operate a business in addition to their work as custodian agents and express agents.

Examiner Funk: Would it be possible for you, Mr. Long, to include in category No. 5 all the individuals you have designated as caretaker or custodian agents?

Mr. Long: It would be, as far as I designate them. I can't speak for everybody in Express Agency. Some mistakes might be made, but if they are called caretaker or custodian agents, and if the facts show that they are such within this definition, we concede that for the purpose of this hearing they are employees.

Examiner Funk: With regard to category No. 6, Mr. Long, what is your contention?

Mr. Long: We contend that those individuals and those agents are independent contractors and not employees within the meaning of the Acts involved in this proceeding.

Mr. Crawford: Pardon me, Mr. Examiner, I would 1741 like to clear up one point there, Mr. Long, with reference to No. 6. I noticed in your categories on page 3 of the original hearing, you refer to them as "individuals." When you get into 6 here, in your supplement, you say "individuals, corporations and or partnerships." Now, as I recall the testimony, some of these men that appeared in your behalf as witnesses testified that their business was on some occasions a partnership, and probably on other occasions it might have been a corporation. But, as I understand it, these individuals are the merchant agents doing the work, you say incidental to their busi-

ness, but in fact it is the individual himself who is the merchant agent and not the corporation or the partnership. Is that correct?

Mr. Long: That is not correct. Now, some time ago the Railroad Retirement Board ruled that the individuals actually performing the work were employees of Railway Express Agency even though the contract for the operation of the agency as a merchant agency was between Railway Express Agency and the employer of such individual, which was a corporation or a partnership or something other than an individual. We do not agree with the Board's ruling on that, and I believe that this hearing has been called for the purpose, among other things, of clarifying that situation.

Mr. Crawford: That's the reason that is now inserted at this time and was omitted at the first.

Mr. Long: Well, those are categories which were set out by the Examiner, not by the Express Agency, in the Examiner's report—not by the Express Agency.

Examiner Funk: What page is this?

Mr. Crawford: I was referring back to page 3. This is what called my attention to it.

Mr. Long: He was referring to the Examiner's report. That is not the original hearing.

Examiner Funk: With regard to category No. 7, what is your contention, Mr. Long?

1742 Mr. Long: We contend that such agents are independent contractors and not employees.

Examiner Funk: With regard to category No. 8.

Mr. Long: We are waiving our claim as to them also and concede that probably most of them are employees. There are so many and various situations that it is impracticable if not impossible within the confines of a hearing such as this to define each and every individual and say whether each one is or is not an employee. Frankly,

I don't think that anything will come up with respect to them, but I can't lock the door against any of them who might later on come in and say that they are not employees. We are waiving our claim as to them, and that is about all I can say.

Examiner Funk: With regard to category No. 9, do you admit that these individuals are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this hearing, we do, and I might add that we do consider them as borderline cases but we are waiving on them in order to make the definition of merchant agent more sharp and to enable our people and the Board to better determine whether a particular agent is within or without the category of merchant agent.

Examiner Funk: You state that you are waiving your demand, Mr. Long. Are you admitting for the purposes of the Railroad Retirement Act that they are employees?

Mr. Long: Yes. For the purpose of this hearing, we do.

Examiner Funk: Category No. 10: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: For the purpose of this hearing, we do.

Examiner Funk: Category No. 11: Do you admit that the individuals herein described are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

1743 Mr. Long: We contend that such individuals are independent contractors.

Examiner Funk: Category No. 12: What is your contention there?

Mr. Long: We contend that they are employees of an independent contractor, and therefore not employees of Railway Express Agency.

Examiner Funk: And with regard to category No. 13?

Mr. Long: We contend that they are not employees of Railway Express Agency within the meaning of the Acts involved herein.

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MR. STEPHEN P. VICTOR, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

Recross Examination by Mr. Hassenauer.

* * * * *

1789 Mr. Victor, going back to these assistants to joint agents, are they reported to the Railroad Retirement Board of employees?

A. They are, and also under protest.

Q. For the purposes of this hearing, do you admit that they are employees?

A. Yes.

Q. What are included within the term "assistants to joint agents?"

A. Usually someone he may employ as a clerk to assist him in doing the office work. He may employ him as a driver to operate his own truck in delivering and picking up express.

Q. Operating the agent's truck?

A. The agent's truck. That's about all.

By Mr. Long:

Q. How about unloading trains and loading trains, Mr. Victor?

A. We include those also.

Q. And some clerical work too?

A. That's right.

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MR. W. S. HALL, a witness produced by the Railway Express Agency, having been first duly sworn, was examined and testified as follows:

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Redirect Examination by Mr. Long.

1849 Q. Mr. Hall, I refer you to the first category, cov-
1850 ering an exclusive agent who is paid a wage or salary and who is carried regularly on the payroll. Will you cite a typical example?

A. You want a particular office?

Q. Yes, we want the particular office.

A. Names?

Q. If you have the name.—One here in Chicago, if you have one, would be satisfactory, I believe.

A. I'll give you Kenosha, Wisconsin.

Q. Now, how many employees has our agent at Kenosha, Wisconsin, who are regularly recognized employees, and who are on the regular payroll?

A. I couldn't give you that accurately at the present time.

Q. Could you give us an estimate?

A. Oh, yes, I could give you an approximate figure.

Q. And how many are there, approximately?

A. Well, we have the agent, cashier, on-hand clerk, foreman, and I would say ten drivers or combination delivery clerks.

Q. Is our office at Kenosha operated in a building owned by the Express Agency?

A. It is not. It is operated in a building that we lease, have occupied for years, across the street opposite the Chicago-Northwestern passenger station.

Q. Are the vehicles which are used in the performance

of pick-up and delivery service at Kenosha vehicles that belong to Railway Express Agency?

A. They are the property of Railway Express Agency and are garaged in a garage attached to the building.

Q. And are all of these vehicles painted the express colors, green and red?

A. They are.

Q. And they all carry express signs?

A. They do.

Q. Now, does the agent there do any physical work at all?

1851 A. He does not.

Q. His work is exclusively supervision?

A. Supervision and—

Q. And solicitation?

A. Yes, and his desk work, of course.

Q. Now, in receipting for shipments at Kenosha, are the regular forms of Railway Express Agency used?

A. They are.

Q. And who makes those out?

A. The drivers or clerks.

Q. Regular employees of Railway Express Agency?

A. Yes, sir. I might add, for the benefit of the record, there happens to be no transfer at Kenosha, and we do have a truck line operated from Kenosha to Twin Lakes.

Q. Does any railroad serve Kenosha?

A. Chicago-Northwestern.

Q. And do regular employees there take care of the loading and unloading of express to and from trains?

A. They do.

Q. Do you have any of these so-called train meeters at Kenosha who are not on the regular payroll of Railway Express Agency?

A. We do not. They are either clerks or combination clerk-drivers.

Q. To whom do the drivers employed at Kenosha make their settlements?

A. To the cashier.

Q. And to whom does he report?

A. To the assistant treasurer and the district accountant.

Q. Who prepares a balance sheet at Kenosha?

A. The cashier.

Q. And who signs it?

A. The cashier.

Q. Does the agent at Kenosha make internal checks of the cashier's account?

1852 A. Yes, periodically.

By Examiner Funk:

Q. Do you have any of these so-called exclusive employees at any agency where the exclusive employe would be the only one there?

A. You mean a one-man agency?

Q. Yes.

A. I don't recall any one-man agency left in this division.

Examiner Funk: Can you tell us, Mr. Long, whether or not there are any such?

Mr. Long: Yes. I think Mr. Lace testified that there was such a party. We will put him on the stand.—I might ask, is it usual, Mr. Hall, for an exclusive commission agency to be operated by one man?

Witness: Yes.

Q. Do you consider that the individuals referred to in category number 1 are exclusive commission agents?

Mr. Long: Do you know of any salaried agency where there is only one man, Mr. Lace?

Mr. Lace: Yes, I do.

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1859 MR. G. C. LACE was recalled for examination and testified as follows:

Redirect Examination by Mr. Long.

* * * * *

1861 Examiner Funk: Mr. Long, since one of the things we wish to determine here are the factors distinguishing the various categories, I trust that you will endeavor to supply us with the copies of the various forms to which any witness refers, so that we may be able to compare them as we go to the various categories and see which agents complete which.

Mr. Long: Well, Mr. Examiner, we concede that all of these agents use and are required to use the uniform receipts, that they are required to comply with the regulations of the Interstate Commerce Commission. We concede that payroll employee agents are employees. Also, I believe the payroll employees are not within the notice of the meeting.

Examiner Funk: That's right. It is merely in order to compare the various classes to see how they can be distinguished.

Mr. Long: Now, Railway Express Agency has, I believe, in excess of 1500 forms. It would be impracticable to clutter up the record with all of those forms. Salaried agents may at various times be required to use almost all of

1862 those.

Examiner Funk: All of the 1500?

Mr. Long: All of the 1500 forms—whereas these merchant agencies are required to use a comparatively few. Now, if you want that 1500, I will endeavor to get them for you, but it does place a burden upon us and it will get your record here to the time when we have our conflict with Joe Stalin.

Examiner Funk: Well, Mr. Long, can you at least have the witness describe to some extent the various forms to which he refers in his testimony?

Mr. Long: Yes, I'll be glad to do that.

Q. Take this business and expense form. Is that form prepared by a merchant agent, Mr. Lace?

A. No.—I'll qualify that. The salaried agent to which I referred, Tuscola, Illinois, prepares a weekly business and expense report in addition to a monthly business and expense report. The merchant agent prepares only a monthly report.

Examiner Funk: Are these reports similar?

Q. That monthly report of the merchant agent is a balance sheet, is it not?

A. No. I don't know exactly the name of the report. At the salaried office, it is Form 104, and I think Mr. Gross perhaps could tell what the form number used—

Mr. McAdam: 105.

A. At the commission office, 105. It is not as complete a report as the one that is made at the salaried office.

* * * * *

1863 Q. When you speak of Form 105 showing the commissions paid the agent and other expenses, what do you refer to as "other expenses?" Are those allowances made to the agent, if any?

A. Yes. If we make an allowance other than the commission, that would show on the report.

Q. Is that the only other expense that would show up on 105?

A. Yes, that's true.

Q. So that there would not show on 105 any wages paid assistants or employees of the merchant agent, or any telephone cost, or any light cost that he himself assumed. Is that correct?

1864 A. That is correct.

By Examiner Funk:

Q. Mr. Lace, instead of using a merchant agent, for example, let's take a joint agent. Would your answers be the same?

A. I don't believe I understand, Mr. Funk, just what answers.

Q. The answers you have made in regard to the forms completed by merchant agents and the forms completed by salaried agents in category number 1. Would your same answers be given if we were comparing the forms completed by a salaried agent in category number 1 with the forms completed by a joint agent?

A. No. The forms completed by a commission agent are similar to the forms completed by a joint agent.

By Mr. Hassenauer:

Q. Mr. Lace, isn't it a fact that the forms used by a joint agent are entirely different than the forms that may be used by a merchant agent? They don't all use the same forms in making reports to the management.

A. They use similar forms—a balance sheet, the statement form, an abstract form.

Q. But there are other forms required of a joint agent which a merchant agent does not make out. Isn't that correct?

A. I do not recall any others.

* * * * *

1866 By Mr. Long:

Q. Mr. Lace, do you know of any examples of agencies within category 2?

A. Yes. The agency at Jerseyville, Illinois comes within that category. At the time I was Superintendent of the Central Illinois Division, H. Croes, C-r-o-e-s, was agent at Jerseyville.

Q. Do you know who owned the premises or controlled

the premises where the agency operated by Mr. Croes was located?

A. The Railway Express Agency controlled the premises through a lease.

Q. Was pickup and delivery service afforded the public at Mr. Croes' agency?

A. Yes, sir.

Q. And who owned the vehicles in which that service was operated?

A. Railway Express Agency.

Q. Who maintained the vehicles in which that service was operated?

A. Railway Express Agency.

Q. And how many vehicles were maintained there, if you know, for that service?

A. One.

Q. How many assistants or employees did Mr. Croes have exclusively engaged in the performance of Railway Express Agency work?

A. I'm not certain, but I do know that at one time he employed an individual for one or two hours a day
1867 or something like that, to stay in the office and keep it open while he was out performing the pickup and delivery service.

Q. Now, category "(a)" qualifies the exclusive commission agent as performing no service other than Railway Express Agency service and earning a net return in excess of $125 per month. Are there any so-called exclusive commission agents who perform only Express Agency service and who may earn a net of less than $125 per month?

A. Yes, I think there are.

Q. There are some?

A. Yes.

Q. So that there should be added a third subdivision to category 2.

Examiner Funk: Will you define that?

Mr. Long: Yes. We will call it category 2(c): Those who devote all of their time to the service of Express Agency and who earn a net return of less than $125 per month. These agents are not subject to the rules agreement with the Brotherhood of Railway Clerks, and their positions are not subject to bid and are not placed upon a roster.

Examiner Funk: Does the Express Agency admit that these individuals are employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

Mr. Long: The Express Agency does. We concede that they are our employees. We do not confess that they lack some of the attributes of an independent contractor, but we concede, for the purposes of this hearing, and we have always contended, that they are employees. We have given them the privileges of employees, but nevertheless they may have some of the attributes of an independent contractor.

Examiner Funk: When you have completed your discussion of category number 2, will you advise me?

Mr. Long: Yes.

1868 Q. Do you know of any examples of category 2(b), Mr. Lace?

A. No, I do not. That fluctuates. Perhaps a man two or three months would make a net in excess of $125, but it might drop down to lower.

Q. Now, I think you have reference to the category I just defined as 2(c). Do you have any knowledge of an agency who is covered by 2(b)?

A. Oh, yes, I do have knowledge of such an agency. Farmington, Illinois was in my district at the time I was a route agent, and the agent at that point a good many years

ago—I think his name was Elliott—comes within that category.

Q. I take it that you do not have knowledge of an example of the category I have just defined as 2(c)?

A. No, I do not.

Q. Well, now, assuming that there is such an agent covered by category 2(c), would you say that the agents concerning whom you have testified as covered by category 2(a) and 2(b) and this hypothetical individual covered by category 2(c) would all use the same forms in conducting their express agency?

A. Yes, they would.

Q. Would they, for example, be required to make a report of solicitations to Railway Express Agency on Form 156, Exhibit XXVIII?

A. They would.

Q. And what other forms would they be required to make?

A. They would be required to prepare a balance sheet supported by statement and abstract forms.

Q. And they too would be required to issue the uniform express receipts, such as Exhibit XXXVI, upon the receipt of shipments for transportation in express service?

A. Yes, they would.

Q. Now, what are these forms, this balance sheet that you speak of and these other forms, that they make out? Will you detail those and describe them, please?

1869 A. The balance sheet is a record of the revenue received at the office. The statement is a record of the inbound shipments, and the abstract is a record of the outbound shipments.

Mr. Long: Did you want to examine the witness on this category?

By Examiner Funk:

Q. Mr. Lace, to your knowledge, are there any differences between the forms completed by individuals in categories 2(a), (b) and (c), and the forms completed by individuals in category 1?

A. Yes, there is a difference.

Q. What is the difference, Mr. Lace?

A. The forms completed by the individuals in category 1 are more detailed than the forms completed by the others. That is particularly true of the balance sheet. We have one type of balance sheet for salaried offices, and one type for commission offices.

Mr. Long: And this balance sheet for commission offices is used by all commission offices, no matter what they may be. Is that true?

Witness: That is true.

Mr. Long: That includes merchant agencies.

Witness: That is true.

Q. Would you say, Mr. Lace, there is any difference between the forms completed by individuals in categories 2(a) and (b) and (c), and the forms completed by merchant agents?

A. Very little, if any, difference.

Mr. Long: I direct your attention to Exhibit XXVIII, Mr. Lace.

Witness: I overlooked that. That is Form 156, Report of Public Relations and Sales Activities, required of those in categories 2(a), (b) and (c), but it is not required of those in joint commission or merchant commission agencies.

Q. Would you say that is the only exception?

A. No, it isn't. I have overlooked forms that are required from the individuals in 2(a), (b) and (c), in 1870 connection with the operation of our motor vehicles.

If we furnish the motor vehicles, we require a report of expenses on that

Q. Mr. Lace, when you testified last August with regard to exclusive commission agents, it is my recollection that you said there were some few instances where those individuals did not devote all of their time to the express service. Are those individuals the same individuals that were described in category 2(b)?

A. Yes, that would embrace those individuals.

Q. Mr. Lace, what kind of outside service, if you know, is performed by individuals embraced in category 2(b)?

A. The agent at Farmington, Illinois, to whom I referred, performs some pickup and delivery of LCL freight for the railroad serving that city.

Q. Is that the only example you have?

A. That is all I can think of at this time.

* * * * *

1875 Q. Do you know of any examples in category number 5, Mr. Lace?

A. Yes. H. W. Dierker, D-i-e-r-k-e-r, agent at Fowler, Illinois, comes within that category.

Q. Will you state for the record, Mr. Lace, where the express agency at Fowler is located?

A. In the building owned by the railroad which serves that town.

Q. Do you know the duties of the agent to the railroad?

A. He is considered a custodian or caretaker of their property in that town and would unload a shipment of prepaid freight if it were received at that town.

Q. Does the caretaker agent fill out the same forms and use the same forms as merchant agent?

A. Yes, sir.

1876 Mr. Long: That is all.

Examiner Funk: Does he fill out and complete the same forms as used by a joint agent?

Witness: Yes, sir.

Examiner Funk: Would your testimony with regard to

the difference in the forms completed by individuals in categories number 1 and 2 as distingiushed from the forms completed by a merchant agent, be the same with respect to forms completed by an individual in category number 5?

Witness: Yes, sir.

* * * * *

:877 Mr. Long: That is number 9, Mr. Lace.

A. An example of number 9 would be the one mentioned therein, C. C. Harrison, Rockville, Indiana, also Wilma Mehl, Mount Sterling, Illinois.

Q. Who owns or controls the premises in which the agency is operated at Rockville, Indiana?

A. Railway Express Agency.

Q. By reason of lease or ownership?

A. By reason of lease.

Q. Now, is that the only difference between the agency at Rockville and a merchant agency?

A. That is the only difference.

Q. What you have testified with respect to Rockville applies also to Mount Sterling, does it not?

A. It does.

By Examiner Funk:

Q. Are individuals described in category number 5(a) granted any employee privileges?

A. No, they are not.

Q. Do you consider individuals now described in category number 5(a) as employees within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts?

A. Yes.

Mr. Long: That is, for the purpose of this proceeding, we do.

Q. Are the individuals therein described furnished with telephone service by Railway Express Agency?

A. No.

Q. I believe that Mr. Harrison testified that the Express Agency furnished him with a telephone, did he not?

A. Perhaps he did. If he did, I would say that is a correct statement.

Q. Are you familiar with the facts at the station at Rockville, Indiana?

1878 A. No, I am not. That was not within my—

Mr. Long: Except what you heard Mr. Harrison testify here.

Witness: Yes.

Q. Do you know of any differences between the terms caretaker agents and custodian agents?

A. No, I know of no difference.

Q. Would you say that the caretaker and custodian agents are generally at a railroad station where the sale of passenger tickets has been discontinued and freight service has been limited to no more than the receipt of inbound freight prepaid shipments?

A. Yes, I would.

Q. How are these individuals compensated for their services?

A. Usually on a commission basis.

Q. Are they sometimes compensated on a fixed sum allowance or stipulated sum per month basis?

A. They might be, yes.

Q. Is there any difference in the work performed by these individuals and the work performed by merchant agents?

A. No.

Q. Do you expect from them the same type of service that you would expect from a merchant agent, or do you consider that they perform a higher type?

A. I consider that they perform a higher type, and we are, generally speaking, able to get the kind of service from them that we desire, because we go to their railroad employers and obtain their assistance in getting what we want.

* * * * *

1917 MR. PAUL GROSS, JR., was recalled for examination and testified as follows:

Direct Examination by Mr. Long.

* * * * *

1918 A. My service with the express industry commenced on July 14, 1902.

Q. And in the course of that service, you worked for various express companies, did you?

A. My service at the commencement was with the Adams Express Company until June 30, 1918, and with the American Railway Express Company from July 1, 1918 until February 28, 1929, and with Railway Express Agency since March 1, 1929.

Q. In the course of your experience, have you become acquainted with the terminology applied by various express companies to various agents?

A. I have.

Q. And will you detail what you found with respect thereto?

A. May I preface that explanation with this word: that prior to July 1, 1918, although in the earlier testimony I referred to four principal express companies, so-called express companies, there were in fact about a dozen of them. There was the Adams Express Company, the American Express Company, the Southern Express Company, Wells-Fargo. They were the principal express companies. There were also the Great Northern Express Company, the Northern Express Company, the Western Express Company, the Pacific Express Company, the Globe Express Company, the United States Express Company, and sundry other smaller express companies which conducted the express transportation business in the United States. Prior to July 1, 1918, as I said, there were these old express

companies. Effective July 1, 1918, all of those operations were conducted by the one express company, the American Railway Express Company, which commenced operations on July 1, 1918, and continued until February 28, 1929. During those many years, and during the time that the express companies were making their reports to the Interstate Commerce Commission with respect to their revenues,

expenses and other detailed information, there were
1919 two general categories of express agents in which
the accountants for the express companies were interested—namely, those that were on salaried basis and those that were on a commission basis. Salaried agents were paid on the payrolls of the express companies, received a stipulated sum of pay for their services, and commission agents were paid a commission generally at the rate of 10%. The rates of commission naturally varied in different parts of the country and with the different express companies. Not until the advent of the Railroad Retirement Act and the Unemployment Insurance Act was it essential for the accountants in the express service to distinguish between the various classes of commission agents to develop their relationship with the express company. Then when that became necessary, to make that distinction or differentiation, we found these many different categories of agents, some of them called joint railroad commission agents, some merchant agents, branch agents, and these various other categories to which we have referred in this matter.

* * * * *

1920 * * * In the outlying residential districts, in years
gone by, for many years, during at least the forty-seven years that I have been in the express service, in residential areas, in order to accommodate the patrons so that they may be able to forward their express shipments without waiting for a vehicle man to come to call for their shipments, we established in merchants' stores, drug stores

nd other facilities, other stores that were open a sub-
tantial part of the day, so-called branch agencies or
ranch agents. They are not exclusively employed by the
xpress company. They are not salaried employees. They
re in fact not agents, agencies, in the manner in which
e generally refer to the agencies. It is not a separate
ffice.

* * * * *

In the residential areas, outlying areas, it wouldn't be possible to provide these unusual shippers or individ-
921 uals making shipments at unusual times—to provide them with a call card. They had no facilities for dis-
laying it, apartment houses or hotels. We wouldn't think
f being permitted even to go to some hotel room to pick
p a shipment that somebody in a certain room wanted
o have forwarded to San Francisco. So we established
ranch agents in hotels, or at YMCA's, or other places
here any number of people who may want to ship by
xpress could leave their packages to be called for by the
xpress company at some regular time during which the
river would call for the shipments.

By Examiner Funk:

Q. Are these people sometimes referred to as call
gents?

A. They are. The call agent was distinguished some-
hat, I think, from these branch agents in that a call agent
n most places did not do more than accept a telephone
all from someone and carry that forward to some regularly
stablished agency of the Express Company, so that a
all would be made for the shipment.

* * * * *

1922 A. * * *. The branch agents generally were set up to suit the convenience of shippers in outlying
reas where we did not maintain an exclusive salaried

branch office, if I may designate them as such. Some reference was made to the exhibit entitled "Official Directory"—I do not know what the number was.

By Mr. Long:

Q. I show you Exhibit XXXIII, and ask you to explain the use which Railway Express Agency puts that exhibit to.

A. The official directory is, as shown by the cover, a list of the offices with block location and schedule of first and second-class express rates. In the regulation of express companies and their rates and charges by the Interstate Commerce Commission, the express company is required to publish the rates from each point to each point, more specifically as they are stated from each block to each block throughout the United States. Each block is represented by the degrees of latitude and parallels of longitude. The express company is required to publish with the Interstate Commerce Commission a list of offices, places, at which it will accept shipments for transportation by express. Those tariffs are much more voluminous than is this official directory, so-called. For the con-
1923 venience of our people throughout the country—that is, at the principal offices, at least—we publish these official directories and show the block location of each office in the United States where we maintain an office, and provision is made for showing the scale number, which is equivalent to showing the rate per 100 pounds which applies from the point of origin to the point of destination. The directory does not purport to show the number of or the location of any branch agent. In other words, we show, for example, that in the City of Chicago there is an office at Chicago located in block number 838-B. It is listed there only once. It enables the agent in San Francisco to determine what the rate is from San Francisco to Chicago and, by the schedule of first and second-class rates and charges in the back of the book, enables him to determine

hat the charge is for a shipment of a particular weight
om San Francisco to Chicago. There is no reference
this directory to the fact that we have a large number
so-called branch offices; there is no reference in this
rectory to the fact that we may have branch agents.
here is no reference in this directory as to what kind of
agent or what kind of an office it is, whether it is a
laried office, a commission office, or what kind of a com-
ission office it may be.

Examiner Funk: Are any branch agencies actually
sted therein?

The Witness: They are not—not as branch agents.

• • • • •

925 Q. When you refer to offices in the testimony you have just given, you do not, I understand, include ranch package receiving agents.

A. I do not. If I may once more refer to this Exhibit o. XXXIII, each of those places designated is an office, isregarding for the moment any such places as Wauwa-osa, what we call "waybill to" offices. There are a num-er of them here where we indicate, for example, Osboro, ndiana, waybills to Hammond, Indiana, and we do not ave a regular office at Osboro, Indiana, any more than e do at Wauwatosa, Wisconsin. But every one of these ffices prepares its reports periodically, salaried offices laily, commission offices generally once a month, prepare heir balance sheets, their statements and their abstracts, egardless of whether they may be merchant agents or oint railroad-express agents or salaried agents.

• • • • •

1928 *Cross-Examination by Mr. Hassenauer.*

Q. Mr. Gross, in your previous testimony before this Board in the August 1938 hearing, you were asked whether you reported joint railroad-express agents to the Interstate

Commerce Commission as employees of Railway Express Agency, Inc, and you said you did not.

A. I think, if I may add to that answer, Mr. Hassenauer, I think the question was as to whether we had reported the compensation to them as for salaried employees, or whether we include the compensation in our wage statistics filed with the I. C. C. The answer is, we do not.

Q. Since the Order has been entered by the Railroad Retirement Board in Jurisdictional Docket No. 2, you have reported to the I. C. C. joint railroad-express agents as employees of Railway Express Agency?

A. No, we have not.

Q. In view of the hearing now being conducted before Examiner Funk, and in view of the record that has been made here with respect to the joint railroad-express agents to the effect that they are regarded for the purpose of this hearing as employees of Railway Express Agency, Inc., do you contemplate reporting the joint railroad-express agents to the I. C. C. as employees of the Railway Express Agency?

A. We do not.

Q. Can you state to the Examiner the reason why you will not report them as employees, in view of the record made in this case?

A. For the reason that, as I explained before, sal-
1929 aried employees are the only employees whose time and compensation we include in the wage statistics which we supply to the Interstate Commerce Commission, and the only compensation which is included in the wage accounts, of which there are some dozen or more, which we report to the Interstate Commerce Commission, whereas the joint railroad-express agents are compensated on a commission basis and the compensation is properly chargeable to an I. C. C. account prescribed by that commission, Account No. 39, titled "Commissions", in which we would

clude the compensation we pay to joint railroad-express ents. The compensation which we pay to joint railroad-press agents varies considerably. There is no stipulated n per month which we pay to those individuals. Their mpensation is on a basis of commission, generally of 10%. some cases, the joint railroad-express agent may receive very small amount of commission; in other cases, it would larger. If we were to include in our wage statistics re-orted to the I. C. C. the compensation we paid joint ilroad-express agents, we would entirely distort our wage atistics reported to the Commission..

Q. Does the Interstate Commerce Commission make any fference between a wage or salary paid to an employee d a commission paid to one, and on that basis determine he ther or not he is an employee within the purview of the quirements of the Interstate Commerce Commission for porting such individuals?

A. The Interstate Commerce Commisison makes no dis-nction between what the Railroad Retirement Board may onsider as employees or nonemployees within the meaning f the Railroad Retirement Act. The accounting classifica-on prescribes merely that the compensation of salaried mployees shall be included in the wage account and in the age statistics independent of the account, and that the ompensation paid commission agents shall be charged to an ccount entitled "Commissions".

Q. In the hearing in August 1938, you were asked 930 this question by Mr. Schreiber, now Associate ieneral Counsel of the Railroad Retirement Board: "In his connection, did you ever ask the Interstate Commerce 'ommission to supply you a different form, if possible, or lid you call their attention to the fact that the form was not nade up to fit the particular circumstances?" Do you re-all that question?

A. I do.

Q. Have you, since that hearing and the Order entered by the Board in Jurisdictional Docket No. 2, ever required the Interstate Commerce Commission to supply you with a different form?

A. We have not.

Mr. Hassenauer: That is all, Mr. Examiner.

Examiner Funk: Mr. Crawford.

By Mr. Crawford:

Q. Mr. Gross, in the exhibit, the official directory in which you list the towns which you cover, I understood you to say it doesn't show or designate the branch agencies but it makes no distinction, does it, as to the offices where there are merchant agents or commission agents or salaried agents?

A. It makes no distinction. It merely indicates that there is an office at that particular point, and does not say whether it is a salaried office or a commission office, a merchant agent or any other kind of an agent.

Q. It might be any one of the group.

A. Except a branch agent. It could not be a branch agent, except in that particular case of Wauwatosa or in those several other cases throughout the directory where we indicate we have service at such a point but do not have an office there and then say where the business shall be way-billed to and what rate applies.

* * * * *

Session on July 28, 1948.

1968 Examiner Funk: I understand, Mr. Long, you have some further testimony you wish to introduce at this time.

Mr. Long: Yes. At the opening of this hearing I would like to state that when we were in here during March I was asked to define certain groups or classifications or categories of individuals and others who represent Express

gency in various capacities. I had not anticipated at that ne the need for such a close definition of the classes or tegories, and since then I have prepared a statement ich I should like to read in the record.

(Remarks off the record.)

Mr. Long: Because the definitions of these groups or classifications, sometimes referred to in the record as 69 categories, as set forth in the Record of the hearing held between and including March 14 and 16, 1949 pear in need of clarification and amplification, Railway xpress Agency, Incorporated submits the definitions set rth below. For brevity Railway Express Agency, Incorporated is referred to as "Express Agency" and the rotherhood of Railway and Steamship Clerks, Freight andlers, Express and Station Employees is referred to "The Clerks." The references in parentheses are to the ges in the Record of the hearing of March 14-16, 1949 here the former definitions or statements relating thereto pear.

1. Individuals, some of whom are in charge of agencies, ho devote all their time to Express Agency service, and ho are paid on a wage or salary basis from the regur payroll. These individuals are called "exclusive emoyees." (R. 324) All in this classification are conceded be employees.

2. Individuals in charge of agencies, who are granted ivileges of employees, such as free transportation and aid vacations, and who are paid on a commission basis on the basis of a stated sum per month. The premises on which their agencies are located are controlled by the xpress Agency through lease or ownership. These have en referred to in this record as "exclusive agents" or exclusive commission agents." (R. 324) They may be ubdivided as follows:

(a) Those who devote all of their time to the service of

the Express Agency, and who earn a net return in excess of $125 per month. These agents are subject to the Rules Agreement between The Clerks and Express Agency, and their positions are subject to bid and placed upon a roster. (R. 325)

(b) Agents who devote substantially all of their time to the service of the Express Agency, but who may perform some independent business of their own, and who earn net commissions of less than $125 per month. This subdivision contains but very few individuals, and those who are within this subdivision generally are former salaried employees. (R. 325)

1970 (c) Those who devote all of their time to the service of the Express Agency and who earn during the course of a year an average net return of less than $125 per month. These agents are not subject to the Rules Agreement with The Clerks, and their positions are not subject to bid and are not placed upon a roster. (R. 485)

All in these classifications are conceded to be employees.

3. Individuals who perform service both for the Express Agency and for one or more railroad companies, and who are paid either by the Express Agency or by a railroad company on a salary basis from the regular payroll, for both their express and their railroad service. These are called "joint employees". (R. 325) All in this classification are conceded to be employees.

4. Individuals who are regular full time railroad agents and who concurrently with their railroad duties act as agents for Express Agency. Railroad and express work are performed on premises furnished by the railroad. They are paid by the railroad for their railroad work and by Express Agency for their express work. For their express work they are paid a commission or stipulated sum per month. These are called "joint railway-express

ents." (R. 325) For the purpose of these proceedings
y are conceded to be employees.

. Individuals paid a commission or stipulated sum per
nth who represent the Express Agency as agent on
emises controlled by Express Agency through lease, or
contract with the railroad upon which the agency is
ated. These individuals are permitted and generally do
rform some other work or operate an independent busi-
ss in addition to their express work. They have not
en granted paid vacations or free transportation and
ver have been considered as employees by Express
gency. They may be subdivided as follows:

(a) Individuals who have some railroad occupation
ch as pumper, station clerk, or caretaker of a railroad
station where the sale of railroad passenger tickets
71 has been discontinued and freight service has been
limited to no more than receiving inbound prepaid
ipments, and who operate the Express office in the rail-
ad station or on other railroad premises and are paid
Express Agency a commission or stipulated sum per
onth. These have been referred to in Express circles
"caretaker agents," "custodian agents," "joint
gents," or "joint employees." (R. 325)

(b) Individuals who have no railroad connection but
ho by reason of the relationship between Express Agency
nd the particular railroad conduct the Express Agency
art time on such railroad premises. (R. 327) An exam-
e is Roscoe Wilson, Chenoa, Illinois.

(c) Individuals who occupy business premises in which
ey may or may not perform some business of their own
addition to express work where Express Agency pays
e rent direct to the landlord, who is not the agent, for
e premises used for the operation of the Express Agency.
Examples are Wilma Mehl, Mt. Sterling, Illinois and C. C.
Harrison, Rockville, Indiana. (R. 327)

Classification 5 covers the individuals previously described in categories 5 and 9. (R. 494)

By reason of the control which Express Agency may be entitled to exercise over the premises upon which the agency is conducted, it is conceded that for the purpose of these proceedings all in this classification are employees.

6. Individuals, corporations or partnerships who, in conjunction with or in addition to some other activity entirely outside of the railroad industry, act as Express agent and have their Express office on premises which they control by reason of ownership or lease or rights superior to that of the Express Agency. Any one of these agents is permitted to have a part or all of the work performed by any of his designees. These agents are paid generally on a commission basis; however, a few are paid a fixed allowance or stipulated sum per month, and a few a commission plus a fixed allowance per month. These have been designated as merchant agents and may be subdivided as follows:

(a) A merchant or small business man who conducts an independent business and at the same time carries on the express work in his regular place of business such as a grocery store, hardware store, garage, etc. These may be further subdivided as follows:

A. Those who have no connection whatever with any railroad.

B. Those who act as caretaker of a station for a railroad, or have some other incidental connection in the railroad industry.

(b) A doctor, priest, minister, public official, who at the institution where he is employed or engaged in some other activity represents the Express Agency as agent.

(c) A housewife who conducts her Express Agency in her home.

(d) An employee of a business not within the railroad

y who with the consent of his employer has the
s office in his employer's place of business. (R.
l 326)
n this classification are not employees.
ndividuals, hotels, YMCAs, warehouses, retail
and the like who perform on premises owned or
led by them, a part or all of the following work
nection with Express business: (a) Receipt for ex-
or baggage transfer shipments on their premises,
shipments are picked up by the Express driver;
ermit undelivered express shipments to be held at
its premises for call by the consignee; (c) Receive
usually by telephone, requesting that a driver of
y Express Agency pick up a shipment at a desig-
ddress, and transmit such calls to either an Express
or agent; and (d) Influence students and others to
xpress service in the transportation of their baggage
undry. These agents are paid so much per shipment
received, although in some few cases they are paid
nission or fixed allowance. These we shall designate
nch package receiving agents. In Express circles,
hey have been referred to as branch agents, branch
ackage receiving agents, sub agents, influencing
gents, campus representatives, or call agents. (R.
d 327) All in this classification are not employees.
Those individuals who have been referred to in our
as "All Others." It would be impracticable for the
se of this hearing to define each classification within
laim, and Express Agency is waiving the claim with
t to them. They include janitor service, station
er service, the meeting of trains, and other incidental
They include policemen and individuals having
r gainful employment in a broad variety of busi-
. They are paid directly by Express Agency and
rm the service they render Express Agency on its or

road premises. (R. 327) Express Agency waives its
n as to them.

Individuals regularly employed by the joint agents
ssist them in the performance of Express work at the
road station. (Formerly 10 as shown on page 327 of
ord.) These are conceded to be employees for the
pose of this record.

(a). Individuals casually, intermittently or seasonably
loyed by the joint agents to assist them in the per-
mance of Express work at the railroad station. We
eve these should be considered as not employees.

0. Individuals regularly employed by the joint agent
perform pick-up and delivery service in vehicles owned
the joint agent. (Formerly 11 as shown on page 327
Record.)

a) Those who perform platform work or railroad work
ddition to driving pick-up and delivery vehicle. These
conceded to be employees for the purpose of this
ord.

b) Those who do no express work or railroad work
er than driving pick-up and delivery vehicle. These are
employees.

1. Individuals employed by the merchant agent to
assist him or to perform entirely the Express work
4 he engages to perform pursuant to his agreement
with Express Agency. (Formerly 12 as shown on
ge 327 of Record.) These are not employees.

12. Individuals who perform all or a part of the work
branch package receiving agent engages to perform in
half of the Express Agency. (Formerly 13 as shown on
ges 327 and 328 of Record.) These are not employees.

Mr. Morgan: Mr. Funk, this statement that has been
esented by the counsel of Railway Express Agency so
to expedite the proceedings—you understand we are
t bound by that statement in one way or another—the
erks.

iner Funk: Nobody is bound by that statement, rgan. The statement which has been read by Mr. merely an expression of the Express Agency's in this matter, as I understand it.

Long: Exactly.

* * * *

Session on August 7, 1950.

R. J. P. NOLL, a witness produced by The Order of Railroad Telegraphers, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

Will you state your full name, Mr. Noll?

John Patrick Noll.

You are General Chairman of The Order of Rail- Telegraphers, on the Missouri Pacific Railroad?

Yes, sir.

* * * *

Examiner Funk: Mr. Long, with regard to the ndividual who signed the questionnaire designated ibit LXV, what is your position?

Long: Mr. Examiner, there appears to be some conflict in the evidence as to the status of Mr. rs at Wabash, Arkansas. Assuming that he repre- Express Agency and conducted his express busi- ess exclusively in his store, we would consider him s an independent contractor. Assuming that he erformed express work at the railroad depot, we consider him as an employee. We say that solely e of the fact that there is need in this case to draw between those who are employees and those who are nployees, or those who are independent contractors ose who are not independent contractors. The line

rather fine one because there are some persons who sent Express Agency as agent who have a number of haracteristics of an independent contractor and at ame time may have a few of the attributes of an oyee. Now, in making our definition, we have put those who perform the work on railroad premises classification of employees. That was brought about ly by reason of the amendments to the Railroad Re-ent Act, which I believe became effective in 1946.

aminer Funk: Referring again to Exhibit LXV, Mr. , and particularly to Mr. Bumpers' answer to ques-5, "Do you handle business at store or have they ? Answer: Store"—in the event this individual d be found to perform both his railroad and express in the store, would your answer in any way be ged?

. Long: It would not.

* * * * *

Mr. Noll: Well, I'd just like to mention the fact that you will find a lot of places on railroads where have an agent in the $200 class, and assigned hours, with the permission of the railroad company, he oper-his elevator, although he has help, but has fixed his so that he can do his book work and handle his busi-for both at his elevator. The simple reason is that oes not want to go down and build a fire and keep an clean. He can do this work when he ain't got any-g else.

Mr. Long:

Well, now, would you know of any specific instances that?

Yes. Elyria, Kansas—McPherson. He's a restricted ator position.

xaminer Funk: That isn't on the exhibit. Do you of some others, please?

r. Noll: This man formerly ran this little station, and

e checked it up, he was doing three, four thousand worth of business a month, and he was subject our check to be entitled to that rate of pay, and what they paid him.

Well, he is considered evidently a joint agent be- his express business is handled on the railroad s. You say that this man at Elyria has employees erate his elevator business?

He's got men working under him part of the time, se, not all the time. They run the elevator.

His express business is handled on railroad prem- ake it?

A. When he rebuilt his elevator, he enlarged his fice, and he's got one section of it there where he andles his railroad and express business. He's not own there to the depot, a half block away, and he s work right there.

He does the railroad work there too, you say?

The railroad and express.

Long: Well, he is not on our exhibit. He is one unusual cases. I've never heard of a case like that

Crawford: Well, that's the thing that puzzles me, aminer. Now, Mr. Long says it is an unusual case, wonder how many of those so-called unusual cases e.

Long: That is not in our exhibits.

Crawford: No, but when the Board makes its de- how is this Board going to determine how many e men we have? Here we have been on merchant Now we are getting into joint agents who are in the same category, where he claims they are not ees.

Long: Well, the railroad pays him a salary. He cognized employee. He operates his business in evator by reason of the fact the railroad permits do so.

Mr. Morgan: Mr. Long isn't talking to the subject at all. The testimony by Mr. Noll, Mr. Examiner, was, here was a man at Elyria, Kansas that ran an elevator, something like a block away from the railroad premises—

Mr. Noll: Now, wait a minute. From the railroad station. He is still on the railroad right of way.

Q. He is on the railroad right of way?

A. His elevator is, sure. He wouldn't be off the right of way.

Examiner Funk: Mr. Long, how would you compare this, using your terminology, "unusual case," with the situation where an individual has a store, and with the permission of the railroad handles his railroad work in the store, and also his express work?

2186 Mr. Long: I cannot answer for the railroad. I do not know what arrangement the railroad would have with the man. I can only say that we would consider a man who is conducting the express agency in a business independent from the railroad industry as an independent contractor. That is where I draw the line.

Examiner Funk: How would you place this man at Elyria, then?

Mr. Long: The man at Elyria is on the railroad premises; he is on the right of way. He is a full time employee of a railroad, and according to what Mr. Noll says, I presume he handles express business there.

Mr. Noll: Eight hours within a spread of twelve.

By Examiner Funk:

Q. Mr. Noll, when you said this individual was on the railroad right of way, you didn't mean to say, did you, that he was on the property owned by the railroad?

A. His elevator is. You see, it's right along the side track, and it's leased from the railroad.

Q. Then it is actually land owned by the railroad?

A. Yes. There is a station there as well. * * *

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EXHIBIT NO. XXXIII.

1948 Official Directory.

(Listing offices, rates, officials, etc., of the Railway Express Agency.)

2613 Flexibility of Express service gives you wide latitude in shipments. You can send almost anything anywhere with safety and speed. Pianos, peaches, gifts, power shafts, baby chicks, are handled as each should be with intelligent personal attention.

Animals and Pets are entrusted to Railway Express on a nation-wide scale by owners, breeders and exhibitors. They are treated with personal attention, fed and watered carefully, and delivered to their addresses promptly.

2626 Fast * Safe * Sure—You take no chances when you use Railway Express. Being nation-wide, with 23,000 offices from coast-to-coast, Railway Express can make prompt deliveries almost anywhere in America—in many localities, overnight—at astonishingly low rates.

2663 An Excellent Service for Installment-Sales Companies, Mail-Order Houses, Collection Agencies, etc.

Railway Express Collection service is of exceptionally great assistance to companies which sell on the installment plan, both retail and wholesale—household goods, refrigerators, washing machines, furniture, musical instruments, radios, automobiles, clothing * * * as well as slicing machines, clothes-pressing equipment, drink-mixing apparatus, etc.

Collection agencies, too, find this nation-wide collection service of Railway Express, with its 57,263 employes and 23,000 offices, an admirable extension to their own service.

EXHIBIT NO. XXXVII.

General Rules and Instructions (1948 ed.).

2909 The Agency also acts as Agent for sale of travel services, American Express Company Money Orders, Travelers Cheques, Foreign Money Orders, Unlimited Checks and other financial paper transactions.

Services for the Railroads and Others.

The Agency performs many classes of service for the Railroads, i. e., station work, pickup, delivery and transfer of L. C. L. freight and passenger baggage, U. S. Mail, etc. Additionally, services are performed for others as acceptance of telegrams, customs brokerage, and transfer of U. S. Mail to and from airports, all of which must be accorded proper attention.

EXHIBIT NO. XXXIX-A.

Circular No. 93-A—Commission.

[Circular No. 93-A contains over 33 pages of detailed instructions. For the sake of brevity only a small portion is reproduced here.]

3019 January 2, 1945.

Subject: Accounting Instructions.

To Commission Agents:

General.

Instructions governing receipting for, handling and delivery of express traffic effective July 1, 1938 provide for use, except as outlined below, of single entry combination receipt, Form 5082 for collect shipments, consisting of receipt to shipper, delivery sheet and abstract advice and

Form 5084 C for prepaid shipments, consisting of receipt to shipper, delivery sheet and abstract advice. The delivery sheet sections of the forms are to be affixed to shipments at forwarding office. Delivery sheet is to be detached from shipment and completed at destination office.

It is essential that original and all copies of receipt be legible and show all necessary information. Care should be exercised to see that date entered thereon is date on which shipment is actually received from shipper. When different date is shown, driver or other receipting employe should make necessary correction by changing forwarding date on face of Receipt, Delivery Sheet and Abstract Advice. If delivery sheet has been affixed to shipment, correct forwarding date should be entered on back thereof in space provided for Remarks.

Abstract advice should be separated from delivery sheet and label section. Delivery sheet should be folded over label section and carefully and securely pasted on shipment.

Delivery sheets should not be pasted over C. O. D. label, lot shipment label, or other labels or marks on shipments, or on exposed parts of merchandise such as crated furniture, etc.

If shipment is of such nature that it is not possible to readily affix delivery sheet and label section thereto, Form 201, Label Tag, should be attached to shipment and delivery sheet parts pasted on tag. Such tags should be attached also to shipments packed in ice, bales, metal bars, castings, trunks, valises, hand bags, etc.

Exceptions:

(a) Money Shipments: See paragraph 11.

(b) Carload Shipments: See paragraph 12.

(c) Air Express Shipments: See Operating and Accounting Departments Joint Circular, General Accounting Department 119-B.

(d) X Label Shipments: See paragraph 10.

Section 1.

Forwarded Business.

For complete description of labels and their use see General Rules and Instructions, Rules 45 to 64 inclusive.

1. Collect Shipments.

(a) Single entry collect receipt Form 5082 is intended for general use in receipting for merchandise classification shipments other than carloads on which charges are to be collected at destination office. Form 5082 is bound in books of fifty and is in three parts, viz:

(1) Receipt to shipper.
(2) Delivery sheet to be affixed to shipment.
(3) Abstract Advice.

When preparing the forms carbon paper should be inserted between parts 2 and 3.

(b) All parts of form should bear complete description of shipment. In every case weight and declared value marked on shipment and class or tariff number should
3020 be shown on the form so that proper charges may be collected at destination. Value and express charges should be entered on abstract advice and delivery sheet sections after receipt section has been detached and before delivery sheet section is affixed to shipment. Where this cannot be done value and express charges should be entered on abstract advice section only.

(c) To insure the collection of proper charges at destination the value and express charges and tariff number should be shown on abstract advice and delivery sheet covering each shipment moving under commodity tariffs, pound rates, third class rates, higher than first class rates, and paid in part shipments. See Traffic Department Circular 12.

(d) Shipments of second class matter forwarded collect should be weighed if ice or dry ice is used so that charges may be computed with allowance for weight of ice. Gross and net weights should be shown on face or back of delivery sheet and on abstract advice. It will be necessary also to weigh shipments of live fish in tanks, barrels or cans, live poultry and pigeons and other commodities where classification provides actual gross weight at time of shipment is to apply. Actual gross weight should be shown on face or back of delivery sheet and on abstract advice.

(e) Weight, rate, value and express charges should be shown on abstract advices and delivery sheets covering shipments destined to Canada.

(f) Month should be indicated by name or usual abbreviation, not by numeral. Name of state should be written out sufficiently to avoid confusion. See General Rules and Instructions, Rule 13.

(g) For a C. O. D. shipment enter amount of C. O. D. on all parts of form in space provided. If "C. O. D. Service Charge" is not to be collected from consignee write "No" in "C. O. D. Service Charge" space. If to be collected from consignee, write "Yes."

(h) For instructions pertaining to preparation and handling of Form 7175, Brief of Information for C. O. D. Shipments, see General Rules and Instructions, Rules 416 to 426.

ORAL ARGUMENT BEFORE EXAMINER FUNK.

(October 6, 1954.)

3508 Examiner Funk: The merchant agent is the official representative of the Railway Express Agency in his locality is he not?

Mr. Long: That's right, no question about it.

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3519 Examiner Funk: Mr. Long, you will recall that during the early days of the hearing, some of the individuals who were then referred to as joint railroad-express agents were still considered as merchant agents under your earlier definition?

Mr. Long: Yes, that is true—wait a minute, there are some merchant agents who have full-time employment with the railroad, but in those cases, such as that Dehoff case in Maryland, there the agent is a full-time employe, I think he is also a member of the telegraphers. The agency, however, is operated in a store, which is operated, in turn, by a partnership, and Dehoff is one of the partners. Dehoff evidently spends his working time on his job in the railroad, and his partner takes care of the store and the express agency.

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3523 Examiner Funk: Mr. Long, let's go back to something we were talking about a little while ago. Did I understand you correctly to say that it is possible for a merchant agent, without a break in service, to be reclassified, for instance, to an exclusive commission agent?

Mr. Long: I didn't say that merchant agents may be reclassified; I did admit that a merchant agent might accept a position with the Railway Express Agency, in which event he would be classified as an employe in that position; that is what I said.

Examiner Funk: Mr. Long, if a man is called a merant agent up to a certain date, at the same locality, with- t any break in service, and then becomes an exclusive mmission agent, would there be any change in the type service rendered at that agency?

Mr. Long: No change in the specifications as to the ork, practically none. Let's see, I believe there wouldn't any change in the specifications; I am pretty sure that what the record shows.

Examiner Funk: There are these cases in your exhibits here a man will be listed for a certain length of time as merchant agent, and then the city is no longer listed in e merchant agent exhibit. However, if we look in your t of agents issued January 1953, we find him listed as a ntract or exclusive agent or, as in the case of Warren, hode Island, as a salaried agent.

Mr. Long: That is possible. Tomorrow I might go out d get a job helping a farmer, I can work outdoors then, t there is nothing in the law that prohibits me from ing it, that prohibits any contractor from taking emoyment as an employe for the Railway Express Agency anybody else.

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Examiner Funk: Then there is also the type of case, Mr. Long, where a man is listed in the exhibits a merchant agent, beginning as of a certain date, alough he has been reported by the Express Agency to ir bureau of wage and service records for periods before e date he first appears in your exhibits as a merchant gent. Could it be said that such an individual has been eclassified downward?

Mr. Long: It is not a reclassification, it is a change; is a change from an employe status to that of an indeendent contractor, possibly.

Examiner Funk: Then the road runs both ways; that s, a man may be changed from merchant agent, for instance, to exclusive commission agent, and likewise from xclusive commission agent to merchant agent. Is that rue?

Mr. Long: Beg your pardon?

Examiner Funk: Is it true that it is possible for a merhant agent to change to an exclusive commission agent, nd also for an exclusive commission agent to change to merchant agent?

Mr. Long: Certainly, it is possible; there isn't any uestion about it.

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PETITIONER'S ORAL ARGUMENT BEFORE THE BOARD.

(June 28, 1956.)

3859 Mr. Long.

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3865 • • • Now, Mr. Burns testified that these eighteen employees were his employees; they were hired and they were discharged and their wages were controlled exclusively by him without any supervision on the part of the Express Agency whatever. In fact, those eighteen employees were members of one of Mr. Lewis' unions—the name of which is in the record and the name of which
3866 I do not recall at the present time—but that union had nothing whatever to do with Railway Express Agency or with any employer in the industry. Any negotiations with respect to working conditions, with respect to wages, was not conducted by the Railway Express Agency. The Railway Express Agency would not even have any notice of such negotiation; such negotiation would be had between

Burns, the employer, and the representative of the
n.

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During the course of these proceedings it was
found that there are some variances from the defini-
of joint agent and from the definition of merchant
t, and these have been brought about by historical
rs largely. They have been brought about largely by
n of these factors. Express Agency has established
xclusive commission agency in a town. The business
when the agency was established has been sufficient
y the exclusive commission agent a fair living. Busi-
has declined, and eventually there was insufficient
ess there to permit the exclusive commission agent to
earn a living from his express business. In such
cases he has sought, and gained, approval from his
superintendent, or his supervising express officials
some work in addition to his express work, but the
tion whereby Express Agency controlled the premises,
r by ownership or rental, continued. Now, that ex-
re commission agent had changed a trifle; he had
ged, in fact, he had taken on some outside work, but
ray Express Agency still continued to control the
ises. There was a recognized employee at the instance
service for Railway Express Agency.

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